

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, TRUSTEE OF THE ESTATE OF MARSHALL RENO MATLEY, FORMERLY DOING BUSINESS UNDER THE NAME AND STYLE OF MATLEY'S FOOD STORES, PETITIONER.

vs.

VERNA MAY MATLEY

BY WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1942.

CERTIORARI GRANTED JANUARY 4, 1943.



United States
Circuit Court of Appeals
for the Ninth Circuit.

G. E. MYERS, Trustee of the estate of Marshall
Reno Matley, formerly doing business under
the name and style of MATLEY'S FOOD
STORE, Bankrupt,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the District of Nevada.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**NAMES AND ADDRESSES OF ATTORNEYS
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For the Appellee, [1*]

In the District Court of the United States,
in and for the District of Nevada

No. 683

In the Matter of

MARSHALL RENO MATLEY

formerly doing business under the name and
style of **MATLEY'S FOOD STORE**,

Alleged Bankrupt.

PETITION IN BANKRUPTCY

To the Honorable the District Court of the United
States; in and for the District of Nevada:

The Petition of:

Reno Grocer Co., a corporation organized and
existing under and by virtue of the laws of the
State of Nevada, having its principal office and
place of business in Reno, Washoe County, Nevada;

A. Levy & J. Zentner Co., a corporation organized
and existing under and by virtue of the laws of the
State of California, and duly qualified to do busi-
ness in the State of Nevada, with its principal
office and place of business in Nevada, in Reno,
Washoe County, Nevada;

Humphrey Supply Co., a corporation organized
and existing under and by virtue of the laws of the
State of Nevada, with its office and principal place
of business in Reno, Washoe County, Nevada;

Respectfully shows:

1. That Marshall Reno Matley has been a ci-
zen and resident [2] of Fernley, Lyon County,

Nevada, for more than six months next last past; that during said period he was engaged in the retail grocery business under the name and style of Matley's Food Store, also sometimes referred to as Fernley Mercantile Store, at Fernley, Lyon County, Nevada.

2. That the said Marshall Reno Matley owes debts in excess of the sum of \$1,000.00 and is not a wage earner or a person engaged chiefly in farming or the tillage of the soil.

3. That your petitioners are creditors of the said Marshall Reno Matley, having provable claims against the said alleged bankrupt amounting in the aggregate, in excess of all securities held by them, to the sum of more than \$500.00.

4. That the nature and amount of your petitioners' claims are as follows:

An open account for goods, wares and merchandise sold and delivered by the said Reno Grocer Co., a corporation, to the said alleged bankrupt, within the two years last past, in the sum of \$548.47.

An open account for goods, wares and merchandise sold and delivered by the said A. Levy & J. Zentner Co., a corporation, to the said alleged bankrupt within the two years last past, in the sum of \$560.33.

An open account for goods, wares and merchandise sold and delivered by the said Humphrey Supply Co., a corporation, to the said alleged bankrupt within the two years last past, in the sum of \$78.05.

Your petitioners further represent:

5. That a receiver or trustee was appointed and put in charge of the property and business of said alleged bankrupt while insolvent in that, in the case of Verna May Matley, Plaintiff, vs. Marshall Reno Matley, defendant, being Case No. 65,129, in Dept. No. 2, of the Second Judicial District Court [3] of the State of Nevada, in and for the County of Washoe, the court entered an order on the 18th day of September, 1940, that the Nevada Board of Trade, Inc., be appointed custodian of said business known as Matley's Food Store in Fernley, Nevada, and have the right to take possession thereof and to conduct said business, and to attempt to consummate a sale thereof subject to the approval of the court; that pursuant to said order the said Nevada Board of Trade, Inc., on said day, took possession of said store and did operate the same as custodian thereof.

6. That on the 24th day of October, 1940, the said Marshall Reno Matley, wrote a letter to the Nevada Board of Trade, Inc., reading as follows:

"Reno, Nevada,
October 24, 1940

Nevada Board of Trade, Inc.

27 Stack Building

Reno, Nevada

Gentlemen:

Replying to your repeated demands that I pay various creditors represented by you, I can

only inform you that I am completely unable to make any payment upon my debts.

I am aware of the fact that you have advised me that a bankruptcy petition will undoubtedly be filed against me. However, there is nothing that I can do about the matter.

Since I am completely unable to pay my debts, I am willing to be adjudged a bankrupt upon this ground in the event a bankruptcy proceeding is instigated by my creditors.

Very truly yours,
MARSHALL RENO MATLEY

Wherefore your petitioners pray that service of this petition, with subpoena, be made upon the said Marshall [4] Reno Matley as provided in the Acts of Congress relating to bankruptcy, and that the said Marshall Reno Matley be adjudged a bankrupt within the purview of said Acts.

Respectfully submitted,

(Seal) **RENO GROCER CO.**

By **J. M. BLAKLEY**

Treasurer

A. LEVY & J. ZENTNER

By **RALPH S. CASEY**

Resident Manager

(Seal) **HUMPHREY SUPPEY CO.**

By **W. E. FUHRMAN**

Vice President

State of Nevada,
County of Washoe—ss.

On this 24th day of October, 1940, personally appeared before me, Myrta McCarthy, a Notary Public in and for the County of Washoe, State of Nevada, J. M. Blakley, known to me to be the Treasurer of Reno Grocer Co., a corporation, Ralph S. Casey, known to me to be the Resident Manager of A. Levy & J. Zentner Co., a corporation, and W. E. Fuhrman, known to me to be the president of Humphrey Supply Co., a corporation, the corporations that executed the foregoing Petition, and upon oath, each for himself and not one for the other, did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said corporation, and that the seal affixed to the said petition is the corporate seal of said corporation; that the signature to said instrument was made by him as such officer of said corporation as indicated after his said signature, and that said corporation executed the said Petition freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

(Seal) MYRTA McCARTHY

Notary Public in and for the County of Washoe,
State of Nevada.

[Enlorsed]: Filed Oct. 24, 1940. [5]

[Title of District Court and Cause.]

PETITION

Comes now the petitioner, Verna May Matley, and states:

1. That petitioner is and since April 22, 1930 has been the wife of Marshall Reno Matley, the above named bankrupt, and since that date they have been and now are residents of the State of Nevada.
2. That petitioner now is and since prior to the commencement of the above entitled cause has been in the possession of and residing at those certain premises known as No. 316 Caliente Street, Reno, Nevada, said premises being described as Lot 41 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, using and claiming and with the intention to use and claim said premises as a homestead; that by virtue of the laws of the State of Nevada, and especially Article IV Section 30, Constitution of Nevada (81 N. C. L. 1929) and Section 3315 Nevada Compiled Laws 1929, either petitioner or the bankrupt above named, or both, is entitled to a right to a homestead in said premises and the exemption thereof.
3. That said real estate was listed by said bankrupt in [6] Schedule B-1 filed herein by said bankrupt on November 6, 1940, but that said bankrupt failed and refused and still fails and refuses to claim said premises as exempt, although entitled so to claim under the laws of the United States and of the State of Nevada; that petitioner claims the

exemption of said premises as a homestead; that petitioner is in necessitous circumstances and has no other home than said premises; that said bankrupt has failed and continues to fail to provide petitioner with the common necessities of life; that unless said homestead is exempted and recognized petitioner will be deprived of a home.

4. That petitioner owns, and for a long time prior to the commencement of the above entitled cause has had possession of and owned as her separate property a certain 1934 Ford sedan, and the above named bankrupt and the trustee herein have not had nor has either of them had any interest therein or right thereto nor do they or either of them have any interest or right therein.

5. That in Schedule B-2 filed herein by said bankrupt on November 6, 1940 said bankrupt listed said automobile as his personal property, whereas at that time, prior thereto and since then, said automobile was and is the separate property of this petitioner; that petitioner is entitled to the said automobile and the possession thereof.

6. That the personal separate property of said bankrupt and a large portion of the personal community property of petitioner and said bankrupt have been in the sole custody of said bankrupt, and petitioner is without knowledge as to the exact nature of said property; that if there are other exemptions than those herein claimed or set forth in Schedule B-5 herein which are proper and allowable by law, petitioner claims said exemptions. [7]

Wherefore, petitioner prays that said premises be declared exempt and set aside and recognized as a homestead; that said automobile be set aside and it be declared that neither said bankrupt nor the trustee herein has any right or interest therein; that any exemptions not heretofore claimed to which it may appear that said bankrupt shall be entitled, shall be allowed; that the bankrupt's said schedules be amended so as to show and claim said exemptions and the title and right of possession of said automobile in petitioner, and that petitioner be allowed such other and further relief as may be meet and proper; that the court order and direct said bankrupt to amend his said schedule so that it shall include all exemptions allowable by law and eliminate all assets not belonging to the bankrupt.

Dated: November 23, 1940.

(s) W. M. KEARNEY

Attorney for Petitioner [8]

State of Nevada,

County of Washoe—ss.

Verna May Matley, being first duly sworn, deposes and says: That she is the petitioner above named; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true:

(s) VERNA MAY MATLEY

Subscribed and sworn to before me this 23rd day of November, 1940.

(Notarial Seal) GEORGIA NEWMAN
Notary Public in and for Washoe County, Nevada

[Endorsed]: Filed Nov. 27, 1940. [9]

MINUTES OF COURT,

November 27, 1940

[Title of District Court and Cause.]

At this time appears Robt. T. Adams, Esq., representing Wm. M. Kearney, Esq., and presents to the Court petition of Verna May Matley for exemption of certain property of the bankrupt. Upon motion of Mr. Adams, it is ordered that the petition of Verna May Matley be filed and referred to Hon. Arthur F. Lasher, Referee in Bankruptcy.

[10]

“EXHIBIT A”

DECLARATION OF HOMESTEAD

Know All Men by These Presents:

That the undersigned, Verna Mae Matley, hereby declares that she is married to Marshal R. Matley; that at the time of making this declaration she is residing with her family on those certain premises known as 316 Caliente Street, Reno, Nevada, said premises being described as Lot 11 of Block 20,

Sierra Vista Tract, Reno, Washoe County, Nevada, and consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, with the intention to use and claim the said premises as a homestead:

Dated: October 23, 1940.

(s) **VERNA MAE MATLEY**

State of Nevada,
County of Washoe—ss.

On this 20th day of November, A. D. 1940, personally appeared before me, the undersigned, a Notary Public in and for said County of Washoe, Verna Mae Matley, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at my office in the County of Washoe, the day and year in this certificate first above written.

(Notarial Seal) **GEORGIA NEWMAN**

Notary Public in and for the County of Washoe,
State of Nevada.

My Commission expires May 22, 1944. [11]

[Endorsed]; Copy 94134. Filed for record at the request of _____ Nov. 20, 1940 at 7 minutes past 4 o'clock P. M. Recorded in Volume C of Declarations of Homestead page _____ et seq.,

Records of Washoe County, Nevada. Delle B. Boyd, County Recorder. By Deputy.

Fee for recording \$1.15. Copied.

Indexed. Verified

(In red pencil)

Admitted into evidence as Exhibit "A" Trustee Dec. 6, 1940. Arthur F. Lasher, Referee in Bankruptcy. [12]

[Title of District Court and Cause.]

**TRUSTEE'S REPORT ON EXEMPTION
CLAIM OF VERA MAY MATLEY**

Now comes G. E. Myers, trustee in the above entitled matter, and objects to the granting of the Petition of Verna May Matley filed herein on the 27th day of November, 1940, wherein the said Verna May Matley petitions the Court to declare the dwelling at 316 Caliente Street, Reno, Nevada, exempt as a homestead, and to exempt a certain 1934 Ford sedan shown in the schedules filed herein by the bankrupt upon the ground that the same is the separate property of the said petitioner, Verna May Matley, upon the following grounds, to wit:

1. That said claim for exemption was not filed at the time of the filing of the bankrupt's schedules herein on the 6th day of November, 1940, nor within five (5) days thereafter, although William M. Kearney, Esq., attorney for said Verna May Mat-

ley, was notified of the pendency of said bankruptcy proceeding on the 26th day of October, 1940.

2. That no declaration of homestead as required by law was filed by the bankrupt or by the bankrupt's said wife, [13] *Verna May Matley*, prior to the filing of the petition in bankruptcy herein on the 24th day of October, 1940.

3. That said property can not be claimed as a homestead in fact because it was not occupied by the bankrupt and his said wife as a homestead at the time of the filing of this bankruptcy proceeding; that for some years past the bankrupt has been a resident of Fernley, Nevada, and that within the four (4) years last past the only place that the bankrupt and his said wife lived together as man and wife, was in Fernley, Nevada, and hence, if the bankrupt is entitled to any homestead, it would be the ranch property constituting the last marital domicile of the bankrupt and his said wife.

4. That the evidence affirmatively shows that the bankrupt and his said wife have no children and have been living separate and apart, and that neither the bankrupt nor his said wife can claim a homestead unless they show that they were occupying the said premises as man and wife, or as the head of a family, and that, as a matter of law, the homestead will not be granted to an individual not living with husband or wife or with other dependents.

5. That said 1934 Ford sedan, according to the

testimony of said Verna May Matley, was purchased from the community assets and hence, is community property, and that one automobile truck by which the bankrupt habitually earns his living has already been declared exempt to the bankrupt, and the bankrupt is not entitled to the exemption of a second automobile.

Wherefore, your trustee prays that said petition of Verna May Matley be disallowed, and that said property and said 1934 Ford sedan be declared to be assets of said estate.

G. E. MYERS,
Trustee. [14]

United States of America,
State & District of Nevada,
County of Washoe—ss.

G. E. Myers, being first duly sworn on his oath, deposes and says:

That he is the duly elected and qualified trustee in the Matter of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, Bankrupt; that he has read the foregoing Trustee's Report on Exemption Claim of Verna May Matley, and that the same is true of his own knowledge except as to those matters and things therein stated on information and belief, and as to those matters, he believes it to be true.

G. E. MYERS.

Subscribed and sworn to before me this 16th day of December, 1940.

(Notarial Seal) **ADELENA PAGNI**,
Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: Filed Dec. 16, 1940. [15]

[Title of District Court and Cause.]

**OPINION OF REFEREE ON EXEMPTION
CLAIM OF Verna May Matley.**

On October 24, 1940, certain creditors filed a petition in involuntary bankruptcy against Marshall Reno Matley. On the same date the alleged bankrupt filed an Answer to the Petition whereby he admitted the material allegations thereof. On the same day an Order was made by the Court adjudging Marshall Reno Matley a bankrupt.

The first creditors meeting was held on the 8th day of November, 1940, at which G. E. Myers, of Reno, was elected trustee. Mr. Myers thereafter duly qualified as trustee.

Pursuant to an Order of the Referee, the bankrupt, on November 6, 1940, filed Schedules of his debts and assets with the Referee. Therein he claimed certain property as exempt, but he made no claim of a homestead exemption. In his Schedule B the bankrupt listed as his property real estate consisting of a dwelling house and lot, known as No. 316 Caliente Street, Reno, Nevada, and a

1934 Ford Sedan Automobile. He made no claim of exemption as to either of the said items. [16]

On December 10, 1940, the Trustee filed a report in which he recommended the allowance of the exemptions as claimed by the bankrupt in his Schedule B-5. The property thus exempted did not include the real estate at No. 316 Caliente, nor did it include the Ford Sedan Automobile.

On November 27, 1940, Verna May Matley, the wife of the bankrupt, filed herein a Petition whereby she claimed a homestead in the premises at No. 316 Caliente Street, and whereby she claimed the ownership of the Ford Sedan Automobile as her separate property.

On December 16, 1940, the Trustee filed a Report upon the said Petition of Verna May Matley, whereby he prayed that the homestead claim be disallowed and that the Ford Sedan Automobile be declared to assets of the bankrupt estate.

The matter came on for hearing before the Referee at the Reno City Hall on December 6, 1940, upon the said petition of said Verna May Matley. A further hearing was had thereon on the 16th day of December, 1940. Thereafter briefs were filed by the respective parties, the matter being submitted upon the filing of the petitioner's closing brief on March 27, 1941. The two matters presented for determination will be separately considered.

The Homestead Claim:

Upon the facts the Referee finds that petitioner and the bankrupt were married to each other on

April 22, 1931, and that the marriage has ever since continued. That petitioner and her husband purchased the lot at 316 Caliente Street, in the City of Reno and built a house thereon. They lived on the Caliente Street property for a year and two months. (Transcript p. 4, lines 3-8 Incl.) That the money for the initial down payment on the house was money she and her husband, the bankrupt, earned after marriage. That they borrowed the money [17] to build the house and that they made the payments thereon out of their joint earnings and out of rentals received from the house, which they rented. That the house was built in 1935, approximately five years after their marriage to each other. (Transcript pp. 13 to 15, line 7.)

The Referee further finds that Mr. and Mrs. Matley moved to Wadsworth in April, 1936; on to a ranch owned by a Mrs. Lee which they subsequently purchased. (Transcript p. 19, lines 1 to 12.) Thereafter they moved to Fernley and lived on a ranch which they purchased and which is shown on the Schedule of the bankrupt. (Transcript p. 19, lines 12-17.)

The Caliente Street property, which is the subject matter of the claim, the Referee finds to be community property.

There was offered and admitted in evidence as Trustee's Exhibit "A" a copy of a declaration of homestead filed by Verna May Matley covering the Caliente Street property. The Declaration is signed by Mrs. Matley. It bears date the 23rd day of Octo-

ber, 1940. It was acknowledged as shown by the notarial certificate on November 20, 1940, and was recorded on the same day in Book C of Declarations of Homestead, Records of Washoe County, Nevada.

It is contended on behalf of the Trustee that the decision of the Supreme Court of the United States in *White v. Stump*, 266 U. S., 310, 69 L. Ed., 301, is controlling in this case.

The facts in *White v. Stump* are that Stump, who was adjudged a bankrupt on his voluntary petition, did not in his petition or schedule claim a homestead exemption in "a quarter section of land on which he and his family had been and were residing." "Two months later the bankrupt's wife, with *is* assent, asked that the land be set apart as an exempt homestead [18] for their joint benefit." The exemption was disallowed by the Referee at a hearing, on the trustee's objection. No declaration of homestead was made and filed for record until a month after Stump's petition in bankruptcy was filed and he was adjudged a bankrupt.

The Supreme Court said, in reference to the State law under construction (Page 302 of L. Ed. column):

"The laws of the State of Idaho, where the land is situate, provide for a homestead exemption, but only where a declaration that the land is both occupied and claimed as a homestead is made and filed for record, as therein prescribed.

If the family consist of husband and wife, whether with or without children, either may make the declaration, * * * The exemption arises when the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it."

The Court further said, page 302 of L. Ed., Column 2:

"The Bankruptcy law does not directly grant or define any exemptions; but directs, in Section 6, that the bankrupt be allowed the exemptions 'prescribed by the State law in force at the time of the filing of the petition'; in other words, it makes the State law existing when the petition is filed the measure of the right of exemptions. It further provides that a voluntary bankrupt shall claim the exemptions to which he is entitled in a schedule filed 'with the petition', and an involuntary bankrupt shall claim his in a schedule filed within ten days after the adjudication, unless further time be granted (sec. 7, cl. 8); that the trustee shall set apart the exempt property and report the same to the court as soon as practicable after his appointment (sec. 47a, cl. 11); that the trustee shall be vested by operation of law with the title of

the bankrupt to all property, in so far as it is not exempt, which, 'prior to the filing of the petition,' he could by any means have transferred, or which might have been levied upon and sold under judicial process (sec. 70a); and that the bankrupt shall be given a discharge releasing him from debts owing 'at the time of the filing of the petition'. (secs. 17 and 63)

These and other provisions of the Bankruptcy Law show that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. This has been recognized in our decisions. * * * When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time. In our opinion this point of time is the one as of which the general [19] estate passes out of the bankrupt's control, and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The provisions before cited show—some expressly and others impliedly—that one common point of time is intended, and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt' (sec. 70a). The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were

performed, but of property to which there is, under the State law, a present right of exemption,—one which withdraws the property from levy and sale under judicial process.

“The land in question here was not in that situation when the petition was filed. It was not then exempt under the State law, but was subject to levy and sale. One of the conditions on which it might have been rendered exempt had not been performed. Under the State law the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption.”

It will be noted that, in the foregoing opinion, the Supreme Court is speaking of property “to which there is, UNDER THE STATE LAW, a present right of exemption,—one which withdraws the property from levy and sale under judicial process.” And again, in deciding that the failure to file the homestead declaration before the filing of the petition in bankruptcy was fatal to the exemption, the Court says, “UNDER THE STATE LAW the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to create a homestead exemption.” What the foregoing decision in *White v. Stump* accomplishes is to fix the point of time as of which the exemption rights UNDER THE STATE LAW are to be tested.

Turning now to the home which had been occupied by the claimant, Verna May Matley and her husband, in 1935, remembering that no declaration of homestead was filed in the office of the Recorder of Washoe County, Nevada, until nearly a month after the filing of the original petition by the creditors in this bankruptcy, and giving full effect to the decision in *White v. Stump*, it may be asked what rights, if any, to a homestead ex- [20] exemption remain to Mrs. Matley.

By virtue of Section 6 of the Bankruptcy Act "the State law governs as to exemptions in bankruptcy." 3 *Remington on Bankruptcy*; sec. 1292.

In *Lachman v. Walker*, 15 Nev. 422, the sheriff had levied execution upon real property which had been occupied as a home by the judgment debtors for more than four years prior to Jan. 7, 1879. The judgment in favor of one Rinaldo, had been recovered and docketed in Sept. 1878. On Jan. 7, 1879, the judgment debtors conveyed the property to the plaintiffs. The sheriff's levy was made Jan. 30, 1879. Plaintiff thereupon brought the action to enjoin the sheriff from selling the property under the levy. "The court below sustained defendant's demurrer to the complaint, because it did not appear therefrom that the grantors of plaintiff had at any time availed themselves of the benefits of the homestead act, or had selected the premises according to the provisions of said act."

The Supreme Court said, page 423:

"Plaintiffs refused to amend their complaint and a judgment of dismissal was ordered and entered. This appeal is from that judgment, and but one question is presented for our consideration, viz.: Is compliance with the first section of the homestead statute (Comp. L. 186), in relation to the manner of selection, a condition precedent to the exemption therein provided, when, as in this case, the premises were actually occupied as the home of the judgment debtor, and might have been selected and held as a homestead according to the provisions of the statute?"

The Court then quotes section 1 of the Homestead Act of this State, the material parts of which correspond with the present act, following which the Court said: (Page 424).

"In this case no declaration has even been filed, and we have not the slightest doubt that the property is not exempt. The statute only exempts a homestead which has been selected according to its provisions. 'The homestead * * * to be selected * * * shall not be subject to forced sale. * * * Said selection shall be made by either husband or wife, or both of them. * * * declaring their intention in writing to claim the same as a homestead.' [21]

"The law does not compel any person to have his property become a statutory homestead,

against his will, BUT IT REQUIRES HIM TO DO CERTAIN THINGS IN ORDER TO ENJOY ITS BENEFITS."

No Nevada case has been cited which overrules the decision of *Lachman v. Walker* to the effect that the filing of a declaration is necessary to exempt the homestead from a sale under execution. The Court in the *Lachman* case expressly excluded from its decision any opinion as to what would have been the effect of a homestead declaration filed by the debtors after the docketing of the judgment but before the sale and prior to the conveyance of the property by the debtors.

In the case of *Hawthorne v. Smith*, 3 Nev. 164, the home of W. A. Hawthorne and wife had been attached in a suit against the husband. After the levy of attachment but before judgment the Hawthornes filed a declaration of homestead on the property. The attachment plaintiff having thereafter recovered judgment and levied execution on the home, the sheriff advertised the same for sale. Whereupon Hawthorne and wife brought the action to restrain the sheriff from selling the property. After quoting Sec. 30, Art. IV, of the Constitution of the State of Nevada providing that "A homestead, as provided by law, shall be exempt from forced sale under any process of law. . . .", and secs. 1 and 2 of the Homestead Act of 1865, the Supreme Court concludes, as follows, bottom of page 169:

"As the law is totally silent as to the time when a selection shall be made of a homestead, declares no penalty for failing to select, makes no reservation in favor of liens acquired before selection, but simply says that when selected it shall be exempt from forced sale, we are forced to the conclusion that after the selection is made and filed for record, no levy upon or sale of the homestead property, can be legally made, except for those classes of debts mentioned in the Constitution."

The Referee is of the opinion that the principles laid down in *Lachman v. Walker* and in *Hawthorne v. Smith* are now the settled law in Nevada; and that in this State it is necessary [22] to file a declaration of homestead in order to obtain an exemption of the homestead which is good as against an execution sale; but that the declaration, if filed at any time before the actual sale, is effective to prevent the sale.

The question came before the United States Circuit Court, District of Nevada, in the case of *Nevada Bank of San Francisco v. Treadway*, 17 Fed. 667. This was an action in ejectment brought by the plaintiff bank against Treadway. The complaint alleged that the plaintiff bank had sued to recover a sum of money and levied attachment upon the land in question; that judgment was recovered, execution levied thereunder on said land; and that the land was sold thereunder on August 5, 1881,

after due notice given. The complaint further showed that on August 1, 1881, the defendants intermarried and on the same day filed a declaration of homestead on said land.

The Circuit Court discussed the cases of Lachman v. Walker, 15 Nev. 422 and Hawthorne v. Smith, 3 Nev. 182, and held on authority of the latter case that the sale made by the sheriff on August 5, 1881, after the filing of the Declaration of Homestead on August 1, 1881, was wholly void.

With the above two principles of Nevada law in mind, namely, (1) that it is necessary to file a declaration to exempt a homestead from an execution sale, and (2) that such declaration is effective if filed prior to the actual sale, the effect of the case of White v. Stump, 69 L. Ed., 301, upon the right of Mrs. Matley to a homestead exemption is now again considered.

The reason of the rule in White v. Stump, fixing the time of the filing of the petition as the time as of which the right to an exemption is to be tested, is that "this point of time is the one as of which the general estate passes out of the bankrupt's control, and with respect to which the status [23] and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed."

With the above reason in mind, it may now be asked (1) what changes took place in the status and rights of the bankrupt and the trustee at the filing of the original petition in this bankruptcy on October 24, 1940, and (2) what effect, if any,

have such changes on the right of Mrs. Matley to a homestead exemption in this case? Such changes are declared in Section 70 of the Bankruptcy Act, as amended by the Chandler Act, and the material parts thereof are as follows:

Bankruptcy Act, Sec. 70a (U. S. C. A., sec. 110):

"The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, * * *."

Bankruptcy Act, Section 70e, last sentence of paragraph:

"The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; * * *."

The phrase, "date of bankruptcy," which occurs repeatedly in the above quotation, is defined in Section 1, sub-division a, clause (13) of the Bankruptcy

Act as meaning "the date when the petition was filed." Restating the foregoing in condensed form, it may be said that the trustee in this case is vested as of October 24, 1940, the date of the filing of the original petition, with:

1. The title of the bankrupt to all property which the bankrupt could by any means have transferred prior to the 24th day of October, 1940;
2. The title of the bankrupt to all property "which might have been levied upon and sold under judicial [24] process against him;"
3. The rights, remedies, and powers of a creditor then holding a lien by legal or equitable proceedings upon the premises claimed as a homestead;

We may now briefly consider the rights of Mrs. Matley to the homestead in relation to each of the foregoing rights which vested in the trustee as of October 24, 1940, remembering that her Declaration of Homestead was filed with the Recorder of Washoe County on November 20, 1940, reserving the second item to be considered last in order.

1. Homestead rights of Mrs. Matley as against the Trustee's title to property which Reno Marshall Matley, the bankrupt could by any means have transferred prior to October 24, 1940.

First of all the Trustee acquired by Section 70, sub-division a, clause (5), "the title of the bankrupt as of the date of the filing of the petition in bank-

...ptey * * * to all * * * property * * * which prior to the filing of the petition he could by any means have transferred * * *. But the homestead here in question could not have been transferred by the husband prior to the filing of the petition, for section 3360 Nevada Compiled Laws, being the section which invests the husband with the entire management and control of the community property, provides "that NO DEED OF CONVEYANCE—OR MORTGAGE OF A HOMESTEAD AS NOW DEFINED BY LAW, REGARDLESS OF WHETHER A DECLARATION THEREOF HAS BEEN FILED OR NOT, SHALL BE VALID FOR ANY PURPOSE WHATEVER UNLESS BOTH THE HUSBAND AND WIFE EXECUTE AND ACKNOWLEDGE THE SAME AS NOW PROVIDED BY LAW FOR THE CONVEYANCE OF REAL ESTATE." Under the above section, it was held by the Supreme Court of Nevada, in First National Bank of Ely v. Meyers, 39 Nev. 235, that "Though the homestead was not registered as required by law, the husband's sole conveyance or incumbrance of it cannot pass title."

Hence the trustee took no title to the property claimed as a homestead, under the first point considered, because Reno Marshall Matley, the bankrupt, could not have transferred this property prior to October 24, 1940. Mrs. Matley's claim of Homestead was good as against Item No. 1.

3. Homestead rights of Mrs. Matley as against the Trustee, vested on October 24, 1940, with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings upon the property claimed as a homestead.

Under the doctrine of *Hawthorne v. Smith*, 3 Nev. 164, Mrs. Matley's homestead declaration filed November 20, 1940, would be effective to prevent a sale of the property by a creditor holding such a lien. Insofar as the Trustee merely stands in the shoes of such creditor, the homestead declaration would be effective to prevent a sale under the lien.

2. Homestead rights of Mrs. Matley, as against the trustee holding the title of the bankrupt on October 24, 1940, to all property which might have been levied upon and sold under judicial process against the bankrupt.

Of the effect of Division (5) of Sec. 70a of Bankruptcy Act it is said in *Gilbert's Collier on Bankruptcy* (4th Ed.), page 1182:

"Subdivision 5 passes to the trustee all property which prior to the filing of the petition he (the bankrupt) could by any means have transferred, or which might have been levied upon and sold under judicial process against him. It is the broadest and most comprehensive of all the subdivisions. It probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision 6. It includes everything that

can properly be the subject of a lawful transfer, whether it be corporeal or incorporeal; every vested right and interest growing out of property."

All of the right, title, and interest of the bankrupt in the property at 316 Caliente Street, and now claimed as a homestead by Verna May Matley, was subject to levy and sale on October 24, 1940, for no homestead declaration had been filed upon the same on that date. Under the doctrine of *Lachman v. Walker*, 15 Nev. 422, the same was not exempt on said date. It [26] follows that on October 24, 1941, by operation of law the trustee in this proceeding became vested with **ALL THE TITLE TO SAID PROPERTY WHICH A CREDITOR MIGHT HAVE OBTAINED BY LEVY AND SALE UPON SAID DATE.**

Up to the date mentioned Mrs. Matley could have perfected her claim of homestead by filing a declaration. She had then had over five years from the acquirement of the Caliente Street property in 1935, within which to take this step. On the 24th of October, 1940, however, the trustee in this proceeding held all the title which could have been acquired by levy AND SALE under judicial process against the bankrupt, and the filing of the declaration of homestead on November 20, 1940, came too late.

It is rightly contended by the claimant's counsel that the homestead exemption statute of Idaho which

the Court was construing in *White v. Stump* differs from the Nevada Statute in that, under the Idaho statute, where a levy is effected before a declaration of homestead is filed, "the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it." However, by the second clause of subdivision 5 of section 70a of the Bankruptcy Act, the filing of the petition automatically operates to put the trustee in the position of one who holds under both a levy **AND AN EXECUTED JUDICIAL SALE**; and thus, under the decision in *White v. Stump*, the filing of the original petition in bankruptcy before the filing of a homestead declaration bars the homestead exemption as completely under the Nevada Statute as would be the case under the Idaho statute.

The case of *White v. Stump*, 69 L. Ed., 301, was considered by the Circuit Court of Appeals of the Ninth Circuit in *Georgouses vs. Gillen*, 24 Fed. (2d) 292. This case involved construction of the Arizona homestead statute, which [27] resembled the Nevada statute in that under it the filing of the declaration at any time before a sale under execution would prevent the sale.

The facts in the *Georgouses* case were that on January 11, 1926, the four appellants, as co-partners and as individuals were adjudged bankrupt. The land in question was a single tract of dairy land which stood in the name of John G. Georgouses, one of the partners who held it in trust for the partnership. On December 24, 1925, deeds by

John G. Georgouses, purporting to convey to each of the appellants his several interest in the land, were recorded. On January 27, 1926, 16 days after the adjudication, each of the appellants executed and filed for record a claim of homestead covering the individual interest in the land conveyed to him as aforesaid. The appellants set up homestead claims in their schedules, which were denied by the referee and the denial confirmed by the Judge. From the Order of confirmation they appealed.

The Arizona Statute, paragraph 3292 Rev. Statutes Arizona (Civ. Code 1913) provided that, "The homestead shall from the date of the recording the claim of homestead, be exempt from attachment and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, except a mortgage *** No such sale made after the recording of the claim of homestead shall be valid or convey any interest in such homestead, whether made under a judgment existing before or after the recording of such claim ***"

In affirming the judgment of the District Court, the Circuit Court of Appeals said:

"We find no escape from the view that the case of *White v. Stump*, 266 U.S. 310, 45 S. Ct. 103, 69 L. Ed. 301, is controlling. True, the Arizona statute is not identical with the state statute there involved, and we are not unmindful that the language of a decision is not infrequently to be understood as qualified by

the specific facts and issues under consideration, BUT [28] IN THAT CASE THE SUPREME COURT APPARENTLY ESTABLISHES A GENERAL STANDARD, THE BASIC PRINCIPLE OF WHICH IS EQUALLY APPLICABLE TO THE INSTANT CASE."

Counsel for the claimant cite the case of *Clark v. Nirenbaum*, 8 F. (2d), 451, in which the Circuit Court of Appeals construed a Georgia homestead exemption statute similar to the Nevada Statute to the extent that in Georgia, as in Nevada, the debtor may move to claim his homestead exemption after the levy but before the sale. In this Nirenbaum case the Court said:

"The true adjustment of bankruptcy to the Georgia exemptions is to treat the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may meet before an actual sale by having the exemptions to which he is entitled, if not previously ascertained, set apart to him by the machinery of the bankruptcy court just as he would do in the state court had state process been levied upon it."

The Referee is of the opinion that, in treating "the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may meet before an actual

sale" the Court in the Georgia case failed to give effect to the provision of division (5) of Section 70a of the Bankruptcy Act which invests the trustee as of the date of filing the petition in bankruptcy with the title of the bankrupt to all property, except exempt property," which might have been levied upon AND SOLD under judicial process against him."

The Referee does not think the case of *Clark v. Nirenbaum* should be followed in the present proceeding for the further reason that it is in conflict with the case of *Georgousés v. Gillen*, 24 Fed. (2d) 292 decided by the Circuit Court of Appeals of the Ninth Circuit.

The Referee is of the opinion that the second ground of objection stated by the trustee, viz., "That no declaration of homestead as required by law was filed by the bankrupt or [29] by the bankrupt's said wife, Verna May Matley, prior to the filing of the petition in bankruptcy herein on the 24th of October, 1940," must be sustained.

The Ford Sedan Automobile

The bankrupt's Schedule B-2 contains the following item of personal property:

"1—1934 Ford Sedan (possession of Bankrupt's wife) \$100.00".

The above is not claimed as exempt by the bankrupt, but he does claim as exempt one GMC pick-up

truck valued at \$100.00, which exemption was allowed him by the trustee.

Mrs. Matley asks for an order setting aside the Ford Sedan Automobile to her upon the ground that her husband turned it over to her as her separate property.

Mrs. Matley testified that her husband turned the car over to her as her separate property some time in 1939; that it had never been out of her possession since ~~she~~ separated from her husband in July, 1940; (Transcript Mrs. Matley's testimony p. 5).

Mrs. Matley further testified of the Ford Sedan that—

"He (the bankrupt) said the car was mine—mine."

"At the time he bought the truck he gave me the car and the blue slip had been in my name."

(Transcript, page 38, line 5.)

There is some doubt as to just how the car stands at present on the public records. Mrs. Matley's testimony in that respect is as follows:

Transcript, page 21, line 26: (Mrs. Matley)

"Q. Now with regard to this Ford Sedan— you state that it was your understanding that it was to be your separate property. In whose name was that car registered?"

"A. In—it is in Mr. Matley's name."

"Q. At that time was there any effort made to change the registration of the car?"

"A. Yes."

"Q. Was it changed to you? [30]

"A. It stands in my name."

Trans. p. 38, line 27 et seq. (Mrs. Matley.)

"Q. In whose name does the car stand in now?

"A. The car is in my name now."

~ "Mr. Kearney: (Q.) There was a slip that came back after you had sent in one in your name?

"A. Yes.

"Q. And it was never corrected.

"A. It was never corrected.

"Q. The instruction had been sent in with your slip in your name to re-register it?

"A. Yes."

The testimony shows that the car was purchased with community funds. Mrs. Matley's testimony also shows without contradiction that she had been separated from her husband "the last few months" because of marital differences; that her husband is not providing her with any means of support; and that she has no funds with which to provide for herself. (Trans. page 4)

The bankrupt's schedules verified November 5, 1940, show his total assets to have been \$20,354.37 and his total debts to have been \$14,911.28 on that date. There was no evidence introduced tending to show the insolvency of the bankrupt at the time of the transfer of the car or at the time of the

separation of the debtor from her husband, the bankrupt.

The Referee finds that the said Ford Sedan Automobile is the separate property of the petitioner and that she is entitled to an order setting the same apart to her.

It is ordered that the 1934 Ford Sedan Automobile mentioned in the Schedules and in the petition of Verna May Matley, herein, be set apart to her as her separate property.

It is further ordered that the petition of said Verna May Matley praying that the premises known as No. 316 Caliente Street, Reno, Nevada, also described as Lot 41 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, be declared [31] exempt and set aside and recognized as a homestead, be; and the same hereby is, denied.

Dated at Reno, Nevada, this 11th day of June, A. D. 1941.

(s) ARTHUR F. LÄSHER

Referee in Bankruptcy

[Endorsed]: Filed June 11, 1941. Arthur F. Lasher, Referee in Bankruptcy.

[Endorsed]: Filed July 16, 1941. O. E. Benham, Clerk. [32]

• [Title of District Court and Cause.]

**AMENDED APPEAL AND PETITION
FOR REVIEW.**

Comes now Verna May Matley, your petitioner herein; and appeals from all that portion adverse to petitioner of a certain order made on June 11, 1941, in the above-entitled case and petitions for a review of said portions of said order and in this connection states:

I.

That said order was made on June 11, 1941, by Arthur F. Lasher, Referee in Bankruptcy; to whom the above matter was referred; that appeal is taken from that portion of said order reading:

“It Is Further Ordered that the petition of said Verna May Matley praying that the premises known as No. 316 Caliente Street, Reno, Nevada, also described as Lot 11 of Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada, be declared exempt and set aside and recognized as a homestead, be, and the same hereby is, denied.”

II.

That said order was and is erroneous in that the referee erred as a matter of law in denying the petition of petitioner herein with reference to said property and in failing to declare exempt, set aside and recognize as a homestead, the [33] said property. The referee erred in holding that the filing of

the petition in bankruptcy had the effect of a judicial sale of the homestead property involved herein, so as to avoid the validity of a claim of homestead, the formal declaration thereof being filed after the filing of the petition in bankruptcy and to cut off the exemption of a homestead recognized by the laws of the Nevada and decisions of the Courts of Nevada. The referee erred in refusing to recognize, set aside and declare exempt the said property claimed by your petitioner as a homestead after ruling (page 10 of said opinion) that

"The Trustee took no title to the property claimed as a homestead, under the first point considered, because Reno Marshall Matley, the bankrupt, could not have transferred this property prior to October 24, 1940. Mrs. Matley's claim of Homestead was good as against Item No. 1" (Page 10, lines 28-32)

Said Item No. 1 being stated as (page 10, lines 6 and 7):

"1. Homestead rights of Mrs. Matley as against the Trustee's title to property which Reno Marshall Matley, the bankrupt could by any means have transferred prior to October 24, 1940."

and also after ruling that

"3. Homestead rights of Mrs. Matley as against the Trustee, vested on October 24, 1940, with the rights, remedies, and powers of a cred-

itor holding a lien by legal or equitable proceedings upon the property claimed as a homestead.

"Under the doctrine of *Hawthorne v. Smith*, 3 Nev. 164, Mrs. Matley's homestead declaration filed November 20, 1940, would be effective to prevent a sale of the property by a creditor holding such a lien. Insofar as the Trustee merely stands in the shoes of such creditor, the homestead declaration would be effective to prevent a sale under the lien."

The referee, as a matter of law, erred in denying the petition of your petitioner herein with reference to said real property in the face of the facts found by the referee and the facts shown by the record.

The referee erred as a matter of law in said ruling by failing to give due weight to the equities in favor of your [34] petitioner herein and by failing to give due weight to the uncontradicted evidence as to the intentions and actions of the bankrupt herein as the same affected your petitioner's claims to said real property and the exemption thereof as a homestead.

III.

That unless the execution and enforcement of said order be stayed and suspended and all further action with reference to the property referred to in said order by said referee and/or the Trustee in Bankruptcy appointed in this case be stayed and

suspended pending this appeal and until the final termination thereof, petitioner lièrèin will be seriously and irreparably damaged and will loset the said property and her rights therein.

Wherefore, petitioner prays that the said order be reversed by the Judge of the above-entitled court and that an order be enteredd declaring that said property is exempt and that same shall be set aside and recognized as a homestead and that the objections of the said trustee to the petition of Verna May Matley, claiming said exemption be overruled and that the prayer of said petition be granted; further, that pending this appeal and review and until the final termination thereof, the said order appealed from be stayed and suspended.

Dated: June 19, 1941.

VERNA MAY MATLEY,

Petitioner,

W. M. KEARNEY,

ROBERT TAYLOR ADAMS,

Attorneys for said

Petitioner. [35]

State of Nevada,

County of Washoe—ss.

Verna May Matley, being first duly sworn, deposes and says: That she is the petitioner above named; that she has read the foregoing Petition for Review and knows the contents thereof; that the same is true of her own knowledge, except as to those mat-

ters therein stated on information and belief, and as to those matters she believes it to be true.

VERNA MAY MATLEY

Subscribed and sworn to before me this 19th day of June, 1941.

[Notarial Seal] **GEORGIA NEWMAN,**
Notary Public in and for the County of Washoe,
State of Nevada.

My Commission expires: May 22, 1944.

Service by copy admitted this 21st day of June, 1941.

H. W. EDWARDS

[Endorsed]: Filed June 21, 1941. Arthur F. Lashey, Referee in Bankruptcy.

[Endorsed]: Filed July 16, 1941. O. E. Benham, Clerk. [36]

In the District Court of the United States of America, in and for the District of Nevada.

No. 683 in Bankruptcy

In the Matter of MARSHALL RENO MATLEY,
formerly doing business under the name and
style of MATLEY'S FOOD STORE,

Bankrupt.

OPINION AND DECISION.

Norcross, District Judge:

This is an appeal from an order of the Referee denying the petition of the wife of the Bankrupt that certain premises in the City of Reno be declared exempt and set aside and recognized as a homestead. The denial of the petition is based on one of the grounds of objection stated by the Trustee: "That no declaration of homestead as required by law was filed * * * prior to the filing of the petition in bankruptcy herein on the 24th day of October, 1940."

The salient facts appear to be the following: That certain creditors filed a petition in involuntary bankruptcy October 24, 1940. On the same date the alleged bankrupt filed an answer to the petition admitting the material allegations thereof and, thereupon, an order was entered adjudging him to be a bankrupt. Pursuant to an order of the Referee, the Bankrupt on November 6, 1940, filed schedules of his debts and assets with the Referee in which

was listed the real property in question but no claim of homestead exemption, in respect thereto, was by him made therein. At the first creditors meeting held November 8, 1940, a trustee was elected and qualified. On November 27, 1940, Verna [37] May Matley, wife of the bankrupt, filed a petition claiming a homestead on the premises in question. The bankrupt and petitioner, his wife, were married April 22, 1931. The property, comprising the claimed homestead including the home and other improvements constructed thereon, was acquired from their earnings after their marriage and, hence, was community property. At the time of instituting the proceedings in bankruptcy the property was free of encumbrance and was occupied by the wife of the bankrupt, the said parties theretofore having separated and were then living separate and apart. A declaration of homestead in due form was acknowledged and filed by Mrs. Matley November 20, 1940, and recorded in the records of Washoe County, Nevada.

The decision of the Referee is based on the decision of the Supreme Court in *White v. Stump*, 266 U.S. 310, 69 L. Ed. 301, and that of the Circuit Court of Appeals of this Ninth Circuit in *Georgous v. Gillen*, 24 Fed. (2d) 292. The *White v. Stump* case, *supra*, involved a construction of statutes of the State of Idaho respecting homestead exemption. In that case Stump was adjudged a bankrupt on his voluntary petition. He did not in

his petition or schedule claim a homestead exemption. Two months later the bankrupt's wife, with his assent, asked that the land be set apart as an exempt homestead for their joint benefit. This request of the wife was based on a declaration of homestead made and filed for record a month subsequent to the filing of the petition in bankruptcy. In reference to the Idaho law under consideration the Supreme Court said:

"The laws of the State of Idaho, where the land is situate, provide for a homestead exemption, but only where a declaration that the land is both occupied and claimed as a homestead is made and filed for record, as therein prescribed. If the family consist of husband and wife, whether with or without children, either may make the declaration, * * * The exemption arises when the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents the sale under it."

In the case of *Georgouses v. Gillen*, *supra*, no question of a wife's rights in property subject to a homestead status was presented. [38]

Respecting certain of the respective rights of husband and wife in community property section 3369 of Nevada Compiled Laws—contains the following

provision: "The husband shall have the entire management and control of the community property, with like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate, provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate; * * *."

It is clear from the provision that in as far as a "homestead, as now defined by law," is concerned, the wife has equal rights not only in the community interest but, also, in that of the sale or incumbrance thereof.

In *Brenemen v. Corrigan*, 4 Fed. (2d) 225, the Circuit Court of Appeals of this Circuit said:

"At its present term the Supreme Court of the United States distinctly adjudged that no provision of the bankruptcy law (Comp. St. 9585-9656) interferes with a state statute regarding homesteads. *White v. Stump*, 45 S. Ct. 103, 69 L. Ed. ... The very purpose of the homestead laws is to secure a home and protection for husband, wife, and children against adverse fortune and should always be liberally construed."

In the *White v. Stump* case, *supra*, the Supreme Court in its opinion further stated:

*** * * ; that the trustee shall be vested by operation of law with the title of the bankrupt to all property, in so far as it is not exempt, which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process (see, 70a). ***

"These and other provisions of the Bankruptcy Law show that the point of time which is to separate the old situation from the new in the bankrupt's affairs is the date when the petition is filed. *** When the law speaks of property which is exempt and of rights to exemptions, it of course, refers to some point of time. In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control; and with respect to which, the status and rights of the bankrupt, the creditors, [39] trustee in other particulars are fixed. The provisions before cited show—some expressly and others impliedly—that one common point of time is intended; and, that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as to that time, save only as to 'property which is exempt' (See, 70a). The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is, under the State

Law, a present right of exemption,—one which withdraws the property from levy and sale under judicial process."

Section 3315 of Nevada Compiled Laws, section 1 of an Act entitled: "An Act to exempt the homestead and other property from forced sale in certain cases," approved March 6, 1865, as amended, Stats. 1879, 140, reads:

"The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its improvements, not exceeding in value five thousand dollars, to be selected by the husband and wife or either of them, * * * shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred * * *, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon or for the payment of any mortgage thereon, executed and given by both husband and wife when that relation exists. Said selection shall be made by either the husband or wife or both of them, * * * declaring their intention in writing to claim the same as a homestead, * * * which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the

7 filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; * * *?

The law appears to be well settled by the State Courts of Nevada that the filing of a declaration of homestead at any time before a sale under execution is a filing in time to protect homestead rights and exemptions. *Hawthorne and Wife v. Smith*, 3 Nev. 182; *Lachman v. Walker*, 15 Nev. 425; *Nat. Bank of Ely v. Meyers*, 39 Nev. 235; 150 Pac. 308; *Idem* 40 Nevada 284; *Nevada Bank of San Francisco v. Treadway and Wife*, 47 Fed. 887.

It is the conclusion of the Court that the Statutes of Nevada respecting homestead exemption, brings this case within the rule applied by the Circuit Court of Appeals of the Fifth Circuit in *Clark v. Nirenbaum*, 8 F. (2d) 451; and that the law of this State applied to the controlling facts of this case [40] distinguishes the same from the facts and the law applicable thereto in case of *Georgouses v. Gillen* *supra*.

The order of the Referee denying the petition of Verna May Matley respecting homestead exemption is reversed.

Dated this 25th day of November, 1941.

FRANK H. NORCROSS,

District Judge.

[Endorsed]: Filed November 25, 1941. [41]

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS**

Notice Is Hereby Given that G. E. Myers, Trustee in the above entitled bankrupt estate, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Order and/or Judgment of Court entered on the 26th day of November, 1941, reversing the order of the Referee in Bankruptcy denying the petition of Verna May Matley respecting the homestead exemption claimed by said Verna May Matley.

Dated this 3rd day of December, 1941.

**PAINTER, WITHERS &
EDWARDS**
By T. L. WITHERS
Attorneys for Appellant.

[Endorsed]: Filed Dec. 4, 1941. [42]

[Title of District Court and Cause.]

**APPELLANT'S CONDENSED STATEMENT
OF FACTS.**

An involuntary petition in bankruptcy was filed by certain creditors against Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, on the 24th day of October, 1940, on which day the alleged bankrupt filed

an answer to the petition admitting the material allegations thereof, and upon which day an order was entered adjudging him to be bankrupt.

Thereafter, pursuant to order of the Referee, the bankrupt filed his schedules on November 6, 1940, in which the bankrupt listed the real property in question; the said schedules showing that said property was subject to a mortgage. The bankrupt failed to make or file any claim of homestead.

That the first meeting of creditors was held on November 8th, 1940, on which day G. E. Myers was duly elected trustee and qualified as such, and ever since said day has been the duly [43] elected, qualified and acting trustee of said estate.

That Verna May Matley, wife of the bankrupt, on November 27, 1940, filed a petition claiming a homestead on the premises in question.

That the trustee's report on the homestead claim of Verna May Matley was filed December 16, 1940, refusing to allow said homestead claim.

That hearings were held before the Referee in Bankruptcy on said claim of Verna May Matley on December 6th and December 16th, 1940, at which hearings the evidence showed:

That the bankrupt and said Verna May Matley were married on the 22nd day of April, 1931, and that the property located in Reno, Nevada, upon which homestead was claimed, was acquired from their earnings after their marriage and was community property. Subse-

quently, they constructed a home on said property.

That after building said residence, the same was occupied by the said bankrupt and his said wife as a home for approximately one (1) year and two (2) months and until 1936, when the bankrupt and his wife worked at his father's ranch near Wadsworth, Nevada, and about April, 1940, the bankrupt and his wife removed from Wadsworth to Fernley, Nevada, as a business venture, where the bankrupt acquired an equity of about \$700.00 in a ranch and acquired and operated a combination butcher shop, vegetable and country grocery store, the said ranch furnishing products which were disposed of in the store and butcher shop; that during said business venture, the parties occupied said ranch and the bankrupt's wife testified that they considered such occupancy temporary and rented the Reno property in the meantime with the intention of holding and returning to it, and that at all times she and the bankrupt considered the Reno property to be their home.

That during the summer of 1940 the petitioner and her husband, the bankrupt, separated as a result of matrimonial difficulties; that the petitioner left Fernley and returned to Reno in July of 1940 and re- [44] quested the tenants of said property to vacate the same as she de-

sired to occupy it; that the tenants thereof vacated the same on October 21st, 1940, and the petitioner moved into the premises on or about October 22nd, 1940.

That the petitioner was residing in said house on October 24th, 1940, the date of the filing of the petition in bankruptcy herein, and on November 20th, 1940, the date of the recordation of petitioner's declaration of homestead; that, the petitioner and her husband, the bankrupt herein, have no children, and that during the occupancy of said dwelling by the petitioner beginning on October 22nd, 1940, and continuing until after the filing of petitioner's declaration of homestead on the 20th day of November, 1940, a divorce action was pending between the petitioner and her said husband, the bankrupt herein, and that petitioner occupied said house alone during said period; that during said period reconciliations were believed possible and attempted by the parties but were unsuccessful; that on May 16, 1941, Verna May Matley was granted a decree of divorce from her husband, the bankrupt herein, on the ground of extreme cruelty, said decree, among other things, stating:

§ It Is Further Ordered, Adjudged and Decreed that all of the common or community property belonging to plaintiff, Verna May Matley, and the defendant, Marshall Reno Mat-

ley, be and the same is hereby set over and awarded to the plaintiff, Verna May Matley, to be her sole and separate property, henceforth, which shall include, among other things, the homestead of the parties hereto occupied by plaintiff and defendant for several years as a home and claimed as a homestead, said premises being known as 316 Caliente Street, Reno, Nevada, and described as Lot 11, Block 20, Sierra Vista Tract, Reno, Washoe County, Nevada."

That said G. E. Myers, as receiver or trustee, was not a party in said action and the question of the respective rights of said petitioner and said G. E. Meyers, as receiver or trustee, were not litigated therein.

That on June 1st, 1941, the Referee in Bankruptcy filed his Opinion denying the homestead claim of said Verna May Matley.

That on the 19th day of June, 1941, the petitioner, Verna May Matley, filed an amended appeal and petition for review.

That thereafter the petitioner and the trustee filed briefs, [45] and the matter was argued before the United States District Court on the 8th day of November, 1941.

That on the 25th day of November, 1941, the Court filed its Opinion and Decision reversing the Referee's ruling and gave judgment granting said homestead exemption to the petitioner, Verna May Matley.

That on the 4th day of December, 1941, the trustee filed his Notice of Appeal herein.

Respectfully submitted,

PAINTER, WITHERS &
EDWARDS,

By T. L. WITHERS,

Attorneys for Appellant.

Service of the foregoing Appellant's Condensed Statement of Facts, by copy, is hereby admitted this 12th day of January, 1942.

WM. KEARNEY &

ROBERT TAYLOR ADAMS.

It Is Stipulated that the Appellant's Condensed Statement of Facts filed herein on December 11, 1941, be hereby withdrawn and the foregoing Condensed Statement of Facts substituted therefor, and that the above and foregoing statement of facts, together with the parts of the record and proceedings as heretofore filed by appellant (with the exception of the said statement of facts filed herein on December 11, 1941) may be included in the record on appeal.

ROBERT TAYLOR ADAMS.

[Endorsed]: Filed Jan. 13, 1942. [46]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON BY
APPELLANT ON APPEAL

The sole question involved in this appeal is whether, under the law of the State of Nevada, Verna May Matley, wife of the bankrupt, is entitled to have a certain dwelling house exempted as a homestead, in view of the fact that the bankruptcy petition was filed on October 24th, 1940, and no declaration of homestead was filed until November 20th, 1941.

Respectfully submitted:

PAINTER, WITHERS &
EDWARDS,

By T. L. WITHERS,

Attorneys for Appellant.

Service, by copy, of the foregoing Statement of Points Relied upon by Appellant on Appeal is hereby admitted, this, 10th, day of December, 1941.

WM. KEARNEY &

ROBERT TAYLOR ADAMS,

Attorneys for Appellee.

[Endorsed]: Filed Dec. 11, 1941. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT.United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers, and files of the said United States District Court for the District of Nevada, including the records, papers and files in the Matter of Marshall Reno Matley, formerly doing business under the name and style of "Matley's Food Store", Bankrupt, said matter being No. 683 on the bankruptcy docket of said Court.

I further certify that the attached transcript, consisting of 52 typewritten pages numbered from 1 to 52, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the "Designation of Contents of Record on Appeal" filed in said matter and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid. [51]

And I further certify that the cost of preparing and certifying to said record, amounting to \$20.90, has been paid to me by Messrs. Painter, Withers & Edwards, attorneys for the appellant herein.

Witness my hand and the seal of said United States District Court this 22nd day of January, 1942.

(Seal) O. E. BENHAM,

Clerk, U. S. District Court.

[52]

[Endorsed]: No. 10028. United States Circuit Court of Appeals for the Ninth Circuit. G. E. Myers, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, Bankrupt, Appellant, vs. Verna May Matley, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed January 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States District Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10028

In the Matter of

MARSHALE-RENO MATLEY, formerly doing
business under the name and style of "MAT-
LEY'S FOOD STORE,"

Bankrupt.

G. E. MYERS, Trustee in Bankruptcy,

Appellant,

vs.

VERNA MAY MATLEY, Petitioner,

Appellee.

STATEMENT OF POINTS RELIED UPON BY
APPELLANT ON APPEAL AND DESIGNA-
TION OF PARTS OF THE RECORD
NECESSARY ON APPEAL.

The sole questions involved in this appeal are whether, under the laws of the State of Nevada, Verna May Matley, wife of the bankrupt, is entitled to have a certain dwelling house located at 316 Caliente Street, Reno, Nevada, set aside to her as a homestead, in view of the facts:

1. That the bankruptcy petition was filed herein on October 24th, 1940, and no declaration of homestead was filed by either the said Verna May Matley

or by Marshall Reno Matley, the bankrupt until November 20th, 1940.

(See Petition in Bankruptcy and Appellee's Declaration of Homestead.)

2. That while said declaration of homestead is in the form prescribed by statute, the actual facts do not support the declaration in that:

(a) The facts show that said property was not occupied, used and considered as a homestead by the petitioner.

(b) That at the time of filing said declaration petitioner was living separate and apart from her husband, the bankrupt herein, and has subsequently been divorced from her said husband.

(c) That at the time of filing said declaration of homestead petitioner was living alone in said house and was not the head of a family as set forth therein.

(See Appellant's Condensed Statement of Facts and Appellee's Declaration of Homestead.)

The Appellant further designates the following parts of the record to be printed which he believes necessary for the consideration of the foregoing Points Relied Upon by Appellant on Appeal:

1. Petition in Bankruptcy, filed October 24, 1940.
2. Declaration of Homestead of Verna May Matley.
3. Appellant's Condensed Statement of Facts.

4. Petition of Verna May Matley, filed November 27th, 1940.
5. Trustee's Report on Exemption Claim of Verna May Matley, filed December 16th, 1940.
6. Opinion of Referee in Bankruptcy, filed June 1st, 1941.
7. Amended Appeal and Petition for Review.
8. Opinion and Decision of United States District Court, filed November 25th, 1941.
9. Notice of Appeal.

Respectfully submitted,

**PAINTER, WITHERS &
EDWARDS,**

By **T. L. WITHERS,**

Attorneys for Appellant.

Service, by copy, of the foregoing Statement of Points Relied upon by Appellant on Appeal, and Designation of Parts of the Record Necessary on Appeal now on file in the above entitled Court and Cause, is hereby admitted, this 23rd day of January, 1941.

WM. KEARNEY and

ROBERT TAYLOR ADAMS,

Attorneys for Appellee.

Reserving all rights to object thereto.

[Endorsed]: Filed Jan. 26, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED.

Verna May Matley, appellee above named, hereby designates as a portion of the record which she thinks material and which should be printed, that paper entitled: "Statement of Points Relied Upon By Appellant on Appeal"; said paper having been filed in this case with the Clerk of the district court for the District of Nevada on December 11, 1941 and appearing at page 47 of the original certified typewritten record forwarded by said Clerk and now on file with the Clerk of the above-entitled court.

VERNA MAY MATLEY,

Appellee,

By WM. KEARNEY,

ROBERT TAYLOR ADAMS,

Her Attorneys.

[Endorsed]: Filed Jan. 29, 1942. Paul P.
O'Brien, Clerk.



No. 10028

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

G. E. MYERS, Trustee of the estate of Marshall
Reno Matley, formerly doing business under
the name and style of MATLEY'S FOOD
STORE, Bankrupt,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, May 22,
1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. T. L. Withers, counsel for appellant, and by Mr. Wm. M. Kearney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, September 15, 1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
AND DISSENTING OPINION AND FIL-
ING AND RECORDING OF DECREE**

By direction of the Court, Ordered that the type-written opinion and dissenting opinion this day

rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon appeal from the District Court of the United States for the District of Nevada.

OPINION

Before: Garrecht, Denman and Healy,
Circuit Judges.
Healy, Circuit Judge.

On October 24, 1940, an involuntary petition in bankruptcy was filed against Marshall Reno Matley, appellee's husband; and on the same day, with Matley's consent, he was adjudicated a bankrupt.

On November 20, 1940, appellee filed with the recorder of Washoe County, Nevada, a declaration claiming as a homestead certain premises, consisting of a residence lot in Reno, listed by her husband in his bankruptcy schedules. On November 27, 1940, appellee filed her petition claiming the premises as exempt. The petition was denied by the referee; but upon review by the court the referee's order was reversed, and the trustee appeals.

Appellee and the bankrupt were married in 1931. The Reno property was acquired from their earnings after marriage and was community property.

Subsequent to the acquisition of the lot the Matleys built a residence thereon and occupied the same as a home until 1936, when the two went to work for the bankrupt's father on a ranch near Wadsworth, Nevada. In April 1940 they moved to Fernley where for a brief time the bankrupt operated a small country store. It is in evidence that the absence of the Matleys from the home in Reno was of a temporary nature and that at all times they considered it to be their home and intended to return to it.

During the summer of 1940 the couple separated, and in July appellee returned to Reno and requested the tenant living in the house to vacate. On vacation by the tenant on October 21, 1940, appellee occupied the place and was residing there at the time of the filing of the bankruptcy petition and thereafter, although the bankrupt did not join her. The couple have no children. During the period immediately in question a divorce action was pending between them, although a reconciliation was believed possible and was being sought by the parties. However, in May 1941 appellee was granted a divorce, and by the decree the Reno home was set aside for her as her sole property.

The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt.

By §6 of the Act (11 USCA. §24) bankrupts are allowed the exemptions prescribed by the state laws in force at the time of the filing of the petition. Article IV, §30, of the Constitution of Nevada, provides: "A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists, . . . and laws shall be enacted providing for the recording of such homestead within the county," etc. Section 3315 of the Compiled Laws of Nevada prescribes, in substance, that the homestead selected "shall not be subject to forced sale on execution, or any final process from any court," for any debt or liability, except certain obligations not here pertinent. The selection may be made either by the husband or the wife, and the declaration is required to state that they, or either of them, are residing on the premises at the time and claim the same as a homestead. The declaration must be acknowledged and recorded as conveyances affecting real estate.

The Nevada decisions hold that the filing of a declaration of homestead at any time before sale, although after levy, forestalls sale on execution. *Hawthorne v. Smith*, 3 Nev. 164. Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. *Lachman v. Walker*, 15 Nev. 422.

We have to determine whether *White v. Stump*, 266 U. S. 310 (1924), is controlling. The court there held, on consideration of the Idaho law, that

the bankrupt's declaration of homestead came too late where not placed of record until after the filing of the bankruptcy petition. The state statute (Idaho Code, §54-1206) provided that "from and after the time the declaration is filed for record the premises therein described constitute a homestead." The local decisions, differing from those of Nevada, were to the effect that the filing of a declaration does not operate to avoid a prior attachment or execution levy. The Supreme Court stressed the then provisions of §70a of the Bankruptcy Act to the effect that the trustee shall "be vested by operation of law with the title of the bankrupt, . . . except insofar as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." It was thought that when the law speaks of property which is exempt it refers to some point of time, and that the point of time intended is the date of the filing of the petition. Said the court, "the bankrupt's right to control and dispose of the estate terminates as of that time, save only as to 'property which is exempt,' §70a. The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process."

In *Georgouses v. Gillen*, 24 F. 2d 292 (1928), this court, following *White v. Stump*, *supra*, held ineffective a homestead declaration filed by the bankrupt after the initiation of the bankruptcy proceeding. The Arizona homestead statute and decisions involved in that case were substantially to the same effect as those of Nevada. The court believed that notwithstanding the difference between the Arizona and Idaho statutes there was no escape from the law as declared in *White v. Stump*. It thought that the 1910 amendment of §47 of the Bankruptcy Act (a provision now incorporated in subdivision (e) of §70, 11 USCA §110e)¹ did not diminish the title vested in the trustee by virtue of §70a, but was intended to place the trustee in a position superior to that which he would oc-

¹"The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

The foregoing quotation is from the Chandler Act. The phraseology differs somewhat from that previously contained in §47.

cupy merely as a constructive grantee of the bankrupt.

Since those two cases were decided the bankruptcy statute has been amended, Act of June 22, 1938, 52 Stat. 879, 11 USCA §110. As the statute now reads the trustee is vested with the title of the bankrupt, as of the date of the filing of the petition, "except insofar as it is to property *which is held to be exempt*." Plainly, the phrase "which is held to be exempt" has no reference to a specific point of time. As it stands §70a(5), 11 USCA §110a(5), serves as a sort of catch-all, descriptive generally of the species of property passing to the trustee on the initiation of the proceeding. The statute has no bearing on the subject of exemptions. The problem as to what property should be held exempt is simply left at large, and its solution must be sought elsewhere in the law. We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date. Consult *Clark v. Nirenbaum*, 5 Cir., 8 F. 2d 451 (1925), where it was held that even under the doctrine of *White v. Stump* the formal selection of the homestead may be made after bankruptcy. See also *In re Bass*, Fed. Cas. No. 1091, approved in *Lockwood v. Exchange Bank*, 196 U. S. 294. We think, more particularly in view of the

amendment, that the rule of *White v. Stump* should not be applied so broadly as this court felt constrained to apply it in *Georgouses v. Gillen*, *supra*.

But these considerations aside, the condition of the Nevada law in respect of the wife's right of homestead is such as to differentiate this case from either of the two cases discussed. Section 3360 of the Nevada Compiled Laws reads: "The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of *a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not*, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same . . ." [Emphasis supplied.]

This statute, enacted in 1897, long after the passage of the homestead statute, has been said to manifest a legislative policy precluding "the possibility of a wife being divested of the home by the acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent business transactions in which she had no part." *First National Bank of Ely v. Meyers*, 39 Nev. 235, 247, 150 Pae. 308, 312.² The court stated (39 Nev. 245) that "the homestead sought to be

²See same case on rehearing, 40 Nev. 284, 161 Pae. 929.

recognized and protected by the act of 1897 is not the homestead 'provided by law' . . . , but is the homestead *de facto*, so to speak, created by its being the abiding place of the husband and wife." The facts of that case were that Meyers and his wife had made their home on certain community property in the town of Ely. Meyers borrowed money from a bank and gave as security a mortgage on the property, executed by himself alone. Later the wife filed a declaration of homestead. The court held that though the homestead had not previously been registered as required by law, the husband's sole conveyance or encumbrance of it could not pass title.

Thus, in the situation and for the purposes contemplated by this statute, a *de facto* homestead right subsists in the wife prior to the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy. But, appellant argues, the wife's unperfected right of homestead may be wiped out by the process of levy and sale, as is recognized in *Bank of Ely v. Meyers*, 161 Pac. 929, 932; and, since §70a(5) vests in the trustee the title to all the bankrupt's property which prior to the filing of the petition "might have been levied upon and sold under judicial process against him," the trustee must be deemed to

occupy the position or to possess the title of a purchaser at execution sale.

The short answer to the argument is that the statute does not purport to place the trustee in the shoes of an execution purchaser, Cf. *Georgouses v. Gillen*, *supra*, p. 293; *In re Britannia Mining Co.*, 203 F. 450, 453; 11 USCA Sec. 110c. Nor is *White v. Stump*, *supra*, authority for the proposition that the trustee is deemed to have the title of such a purchaser. Moreover, if the premise were accepted it would substantially nullify in bankruptcy many exemptions provided for in the state laws. It is common state policy to exempt a limited value or number of articles of personal property of a given class, such for example as two horses, one milk cow, or the like, to be selected by the debtor out of the larger mass of like kind of property when occasion therefor arises. Until the selection is made—and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale; and it appears to be the general view of the state courts that in the absence of timely selection a sale on execution wipes out the exemption privilege.³ We are not told how, in cases of provisional exemptions of this character, the right of selection is retained as against a trustee in bankruptcy if the latter is clothed by law with the title of an

³See discussion of the general subject in 22 American Jurisprudence under the heading "Exemptions," §§114 to 140.

execution purchaser as of the date of bankruptcy. Yet it is not denied that the privilege of making the selection in such cases remains with the bankrupt and may be exercised pursuant to §7(8) of the Bankruptcy Act, 11 USCA §25(8). Consult *Clark v. Nirenbaum*, *supra*; *In re Bass*, *supra*; *Bank of Nez Perce v. Pindel*, 9 Cir., 193 F. 917.

The general exemption law of Nevada, §8844 Compiled Laws, lists as exempt numerous articles of personal property, not identifiable except through the process of selection. It is significant that subdivision 15 of that statute likewise lists, as among the kinds of property which "is" exempt from execution, "the homestead as provided for by law."⁴ So far as concerns the bankruptcy law, there is no real difference between these two types of exemptions. Mere seizure of the property does not preclude exercise of the right of selection or designation in either case. As to both types of property the right of selection is lost unless exercised prior to judicial sale. A proper regard for the spirit of the bankruptcy law requires that these humanitarian rights, recognized and protected by the state, be not frittered away by technical refinements or synthetic buildups of unrelated statutory phrases.

Appellant argues further that that Nevada statute, §3315, contemplates only a family exemption, and that a wife who has separated from her hus-

⁴This particular subdivision was incorporated in the statute by amendment in 1911.

band and is living on the property without children or other dependents is not entitled to file a homestead declaration. The point was not made or considered below. In any event it is out of harmony with the language and spirit of the homestead law.

Affirmed.

Denman, Circuit Judge:

(A) The court has decided an important question of local law of Nevada with respect to the right of a wife in a homestead prior to a transfer by operation of the Nevada law, similar to the transfer by operation of law on the filing of a petition in bankruptcy, where the wife has taken no steps to create the homestead prior thereto, in conflict with the applicable Nevada decisions to the contrary.

This is a dissent to the holding of the majority that the transfer by operation of law under §70a of the Bankruptcy Act is the same as a voluntary transfer by the husband to some third party and that therefore a homestead exemption is created without the necessity of making and filing a declaration. For this holding the majority relies on a dictum in the decision of First National Bank of Ely v. Meyers, 39 Nev. 235, 150 P. 308.¹ That deci-

¹But two judges participated in this decision. On rehearing one of the judges carefully distinguishes between a transfer by operation of law in an execution sale in a suit by creditors and the

sion considered the provision concerning the voluntary transfer by the husband of community property as provided in §3360 of the laws of Nevada. N. C. L. 1929. The pertinent portions of the statute read:

"The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatsoever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate; * * *."

That the majority opinion necessarily holds this identity between the transfer by operation of law

mortgaging of the home by a husband, stating "This is but a reannunciation of an old principle. It does not apply to our particular statute, because our statute says nothing as to selection or recordation as affecting the rights of the wife as against those of the husband. Recordation may be, and in fact is, necessary to give notice to all the world of the selection of the homestead to exempt it from forced sale under execution. But to exempt it from alienation by one spouse without the consent of the other, in the absence of specific constitutional or statutory provision, why should such be necessary?" First Nat. Bank of Ely v. Meyers, 40 Nev. 284, 297.

under the Bankruptcy Act and the voluntary conveyance by the husband referred to in §3360, is apparent when we consider that the majority refuses to entertain the principal contention of the appellant trustee and the latest decision of the Nevada supreme court on which his contention is based.

The trustee's contention is that in Nevada the transfer by operation of law on an execution sale is entirely different from the voluntary transfer by the husband, and that the two transactions are governed by entirely different Nevada statutes. These statutes distinguish between the rights, as in bankruptcy, of creditors on a transfer by operation of law, and the rights of the transferee on the voluntary conveyance by the husband. The former rights are determined by §3315 of the homestead statute, and the latter by an entirely different statute, §3360, under the Nevada community property laws.

Under no theory could the majority have refused to consider this latest Nevada decision other than that the Bankruptcy Act itself made the transfer of title from the bankrupt to the trustee, by operation of law, identical with a voluntary transfer by the husband prior to bankruptcy.

The case which the majority refuses to consider as relevant to its decision is *McGill v. Lewis*, 116 P. (2d) 581, 583, decided August 30, 1941. In that case there had been a transfer by operation of the

Nevada law on an execution sale in a suit brought by creditors against the husband. The wife, prior to the sale, had made a so-called recordation of a document which did not comply with the state statutory requirements of a homestead declaration. The court held that upon such a transfer by operation of law, the purchaser under execution in the suit by the creditors took free and clear of any right of the wife to create a homestead in the property conveyed, unless prior thereto there had been a recordation substantially complying with the homestead statute. This decision limits the "solicitude" of the Nevada law to protect the homestead, on which the majority relies, as follows:

"This court agrees with appellants that our constitutional and statutory provisions relating to homesteads should be liberally construed, but the rule of liberal construction can be applied only where there is a *substantial compliance* with those provisions." (Emphasis supplied).

McGill v. Lewis, *supra*, 583.

In so holding the Nevada court reaffirmed its decision in *Lachman v. Walker*, 15 Nev. 422, where, as here, the homestead recordation was made after a transfer by operation of law.

Also, in so holding, the Nevada supreme court distinguishes the transfer by operation of law in a suit by creditors, from a voluntary transfer by the husband in mortgaging property, in a considera-

tion of the case of First National Bank of Ely v. Meyers, *supra*, which is made the basis of the majority opinion, as follows:

"To secure the benefits of the constitutional and statutory provisions exempting the homestead from forced sale under process of law (with certain exceptions not here pertinent), it is necessary that a declaration of homestead be filed for record as provided in §3315, N. C. L., 1929. *Lachman v. Walker*, 15 Nev. 422. The case last cited was not overruled in First National Bank of Ely v. Meyers, 39 Nev. 235, 150 P. 308; *Id.*, 40 Nev. 284, 161 P. 929. In that case, it is true, no declaration for homestead was filed for record but the question before the court was not as to the exemption of the homestead from forced sale; it was whether the husband alone could mortgage the homestead occupied by him and his family.

***"

McGill v. Lewis, supra, 582-583.

Since the trustee stands in the place of the creditors and the bankrupt, what *White v. Stump*, 266 U. S. 301, decides is that the creditors have had transferred to them by operation of law on the filing of the petition in bankruptcy, exactly what would be acquired by operation of law in Nevada on an execution sale in a suit by the creditors against the bankrupt prior to the filing of his petition. That is to say, a title free and clear of any

right of the wife thereafter to create a homestead in the property so transferred. This is the holding made by the referee in bankruptcy which was overruled by the district court. In my opinion, the referee's holding is correct and the trustee should have prevailed on his appeal here.

(B). *The Court has decided an important federal question of first impression, to-wit, an amendment to bankruptcy law, in conflict with White v. Stump, 226 U. S. 310, and the applicable decisions of the United States Supreme Court.*

This dissent is also to the holding that the Act of June 22, 1938, in amending the phrase "except in so far as it is to property which is exempt," to read "to property which is *held to be exempt*,"² changed the rule of *White v. Stump*, 266 U. S. 310, 313,³ and is intended to permit the creation of an exemption after the filing of the petition in bankruptcy. Certainly it would be unusual for Congress to cause such a profound change in the many years of administration of the Act by such a three-word alteration in verbiage, without altering or referring to all the several other provisions summarized in *White v. Stump*, making the date of

²§70a (5), 11 U. S. C. A. §110a (5).

³Reaffirmed in *United States v. Marxen*, 307 U. S. 200, 207, and followed by this court in *Coopman v. Citizens State Bank of Omak*, 83 F. (2d) 815, (C. C. A. 9).

filng of the petition "the point of time which is to separate the old from the new in the bankrupt's affairs." Id. 313.

The Act of 1938 makes a general clarification of the language of the Bankruptcy Act in many respects. In all there were more than 64 amendatory provisions. So far as concerns the original phrase excepting "property which is exempt," it did not fully describe the processes of the Act. Under §7 of the Act of 1898, on filing his petition in voluntary bankruptcy, or ten days thereafter in involuntary proceedings, the bankrupt is required to file his "*claim of such exemptions as he may be entitled to.*" This claim is not one which "is exempt" merely by its filing with the petition. It has to be adjudicated as a proper exemption in the bankruptcy proceeding,—that is, it has thereafter to be "held to be exempt." In making such a general overhauling of the bankruptcy statute this seems the rational explanation of the amendatory phrase in question.

The majority opinion holds that in the words "held to be exempt," Congress had two entirely different purposes. One was to "ameliorate" the position of the wife, a third person, claiming a homestead. In this connection it should be noted that in *White v. Stump*, *supra*, the Supreme Court overruled the holding of this court in *In Re Stump*, 284 F. 199, 203, that the wife was such a third person. The Supreme Court treats her claim as no different from her bankrupt husband.

To impute to the words "held to be exempt" such a creation of the wife's rights as a third party seems too extraordinarily obscure and roundabout a method for Congress to pursue to give it rational credence.

Here the attempted creation of the homestead by recording the claim was 27 days after the filing of the petition and adjudication. In *White v. Stump* it was 60 days thereafter. However, under the majority opinion the claimant could wait at his will to create his exemption. Bankruptcy estates often are months, sometimes years, in the course of administration. Finally, the creditors' claims being determined, all that is necessary for distribution is the sale of the estate's property. On the principle of the majority opinion, on the morning of the sale the homestead claim may be made by the wife or created by the statutory recordation of the husband. It does not seem a reasonable contention that the amendment of 1938 was intended to permit the creation by either the debtor husband or the third party wife of an exemption years after the filing of the petition. All the adjustments and settlements arrived at in the long proceeding well may be frustrated.

A second reason of the majority for treating the amendatory phrase as warranting the creation of an exemption after the filing of the petition is equally untenable. It is that the holding of *White v. Stump* that the exemption must exist when the petition is filed, prevents the selection of barber's

tool's farm implements, milch cows, lawyers' libraries, and the like, permitted by various exemption statutes of the several states. This is an astonishing discovery to make in 1938, after forty years of administration of the act in which there must have been scores of thousands of such exemptions claimed and allowed.

The fact is that unlike the futile claim of an unrecorded homestead in Nevada, these other statutory exemptions actually exist as to the title to the farm implements, etc., when, by operation of law, they are transferred to the trustee on the filing of the bankrupt's petition. Then, as at the time of the transfer by operation of law in an execution sale, the debtor files his designation of the items in the group exempted with the petition transferring his property by operation of law. The later designation in an involuntary bankruptcy relates back, as do his schedules, to the date of filing the creditors' petition.

In Nevada, Idaho and Arizona the judgment debtor must make this designation at or before the execution sale or the exemption is waived. *Hammersmith v. Avery*, 18 Nev. 225, 229; *Idaho Code 8-202*; *Wilson v. Lowry*, 5 Ariz. 335, 52 P. 777.

It would be a vain act to amend the bankruptcy statute by such a phrase as "which are held to be exempt" to give the debtor the right to designate the items of exempt property, when that right is already provided in the Act as it stood before the amendment. The obvious reason for that amend-

ment was that the former phraseology failed to recognize that the mere filing of a *claim* of exemption of property does not make that property something "which is exempt." As stated, the claim of property must be adjudicated when the property becomes "held" exempt.

The decision of the district court should be reversed.

[Endorsed]: Opinion and Dissenting Opinion.
Filed September 15, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10028

G. E. MYERS, Trustee, etc.,

Appellant,

vs.

VERNA MAY MATLEY,

Appellee.

DECREE

Appeal from the District Court of the United States for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Nevada, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the ~~appellee~~ and against the appellant.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the ~~appellee~~ recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and Entered September 15, 1942.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, October 26, 1942.

Before: Garrecht, Denman and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court,—Denman, C.J. not concurring—It Is Ordered that the petition of appellant, filed October 7, 1942, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Painter, Withers & Edwards, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed, to and including November 30, 1942; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT

United States Circuit Judge

Dated: San Francisco, California, October 28, 1942.

[Endorsed]: Filed Oct. 28, 1942.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLÉRK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-seven (87) pages, numbered from and including 1 to and including 87, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of November, 1942.

[Seal] PAUL P. O'BRIEN.
Clerk

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

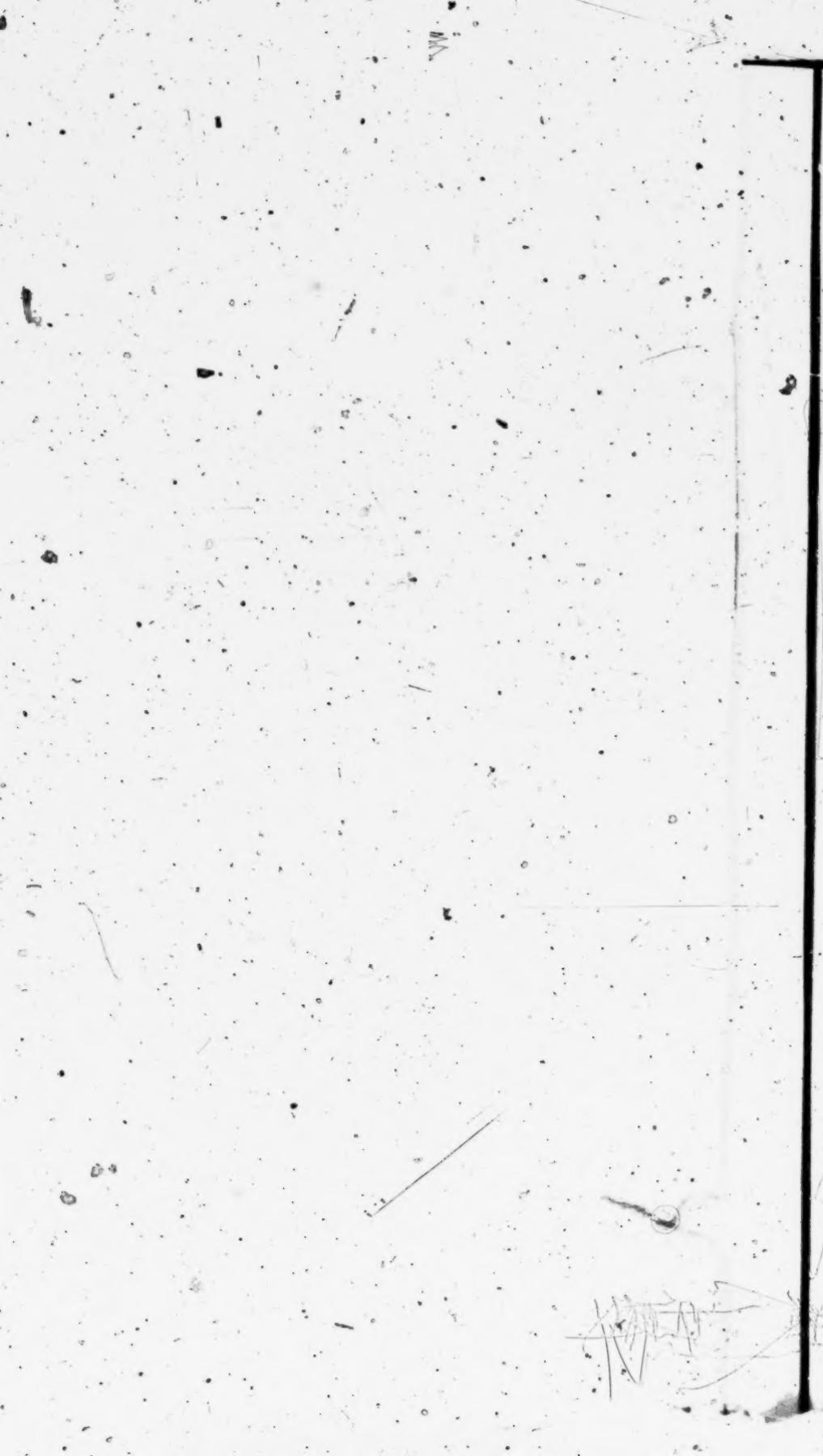
No. 540

ORDER ALLOWING CERTIORARI—Filed January 4, 1943.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4717)



In the Supreme Court

OF THE
United States

Office of the Supreme Court, U.S.
FILED NOV 23 1942
CHARLES ELIJAH BRONLEY
CLERK

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly do-
ing business under the name and style
of Matley's Food Store,

Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,

Respondent and Appellee below.

**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and**

BRIEF IN SUPPORT THEREOF.

HARLAN L. HEWARD,
First National Bank Building, Reno, Nevada,

*Counsel for Petitioner
and Appellant.*

PAINTER, WITHERS & EDWARDS,
153 North Virginia Street, Reno, Nevada,
*Of Counsel for Petitioner
and Appellant.*



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. _____

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly do-
ing business under the name and style
of Matley's Food Store,

Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Associate Justices
of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

This is a controversy arising from an involuntary
bankruptcy proceeding brought in the United States

District Court for the District of Nevada, the petition in bankruptcy being filed on October 24, 1940. (R. 2, 51.)

The Petitioner herein is the duly appointed trustee in bankruptcy in said proceeding (R. 52), and the Respondent herein is the wife of the bankrupt, Marshall Reno Matley. (R. 52.)

The Respondent, on November 27, 1940, filed her petition that certain property be declared exempt as being a homestead (R. 52), to which the Petitioner, as trustee, filed written objections (R. 52) upon the ground that no declaration of homestead had been filed in accordance with the laws of the State of Nevada (R. 52) until November 20, 1940 (R. 10), almost one month after the filing of the petition in bankruptcy on October 24, 1940.

The matter was heard before the Hon. Arthur F. Lasher, Referee in Bankruptcy, who rendered his Opinion sustaining the trustee's objections on the 11th day of June, 1941. (R. 52, 15.)

Thereafter on a Petition for Review to the United States District Court for the District of Nevada (R. 39) said United States District Court for the District of Nevada rendered its judgment on the 25th day of November, 1941, granting the Respondent's homestead exemption claim. (R. 44.)

An appeal from this judgment of the United States District Court for the District of Nevada to the United States Circuit Court of Appeals for the Ninth Circuit was taken by the Petitioner (R. 51), and the said

United States Circuit Court of Appeals for the Ninth Circuit affirmed the Judgment of the United States District Court for the District of Nevada on the 15th day of September, 1942 (R. 66), *Circuit Judge Denman dissenting.* (R. 76.)

The Petitioner thereafter filed a Petition for Rehearing by said United States Circuit Court of Appeals for the Ninth Circuit (R. 86), which said petition was denied by said Court on the 26th day of October, 1942 (R. 86), *Circuit Judge Denman dissenting.* (R. 86.)

BASIS OF JURISDICTION OF UNITED STATES SUPREME COURT.

The judgment sought to be reviewed was entered by the United States Circuit Court of Appeals for the Ninth Circuit on the 15th day of September, 1942 (R. 66), and Petitioner's Petition for Rehearing was denied by said Court on the 26th day of October, 1942. (R. 86.)

The jurisdiction of the United States Supreme Court is invoked under Section 24c of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U.S.C.A. 347.

QUESTION PRESENTED.

Whether, under the United States Bankruptcy Act, Section 70a as amended on June 22, 1938, 11 U.S.C.A. 110; and under the statutes and decisions of the State

4

of Nevada, the Respondent, Verna May Matley, wife of the bankrupt, is entitled to have a certain dwelling house set aside to her as a homestead in view of the fact that an involuntary petition in bankruptcy was filed on October 24, 1940, at which time no declaration of homestead had been filed, and that no such declaration of homestead was filed by either the said Verna May Matley or by her husband, Marshall Reno Matley, the bankrupt, until the 20th day of November, 1940.

This question was decided by the United States Circuit Court of Appeals for the Ninth Circuit and materially affected and controlled the determination of said appeal.

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT.

1. That the United States Circuit Court of Appeals for the Ninth Circuit held that the amendment to Section 70a of the Bankruptcy Act of June 22, 1938, wherein said section was amended by changing the words "which is exempt" to read, "which is held to be exempt" relaxed the rule established by *White v. Stump*, 266 U. S. 310 (R. 72), and permitted a bankrupt to establish a right of exemption after the filing of the petition in bankruptcy.

Circuit Judge Denman in his dissenting opinion (R. 76) says:

"The court has decided an important federal question of first impression, to-wit, an amendment to bankruptcy law, in conflict with White v. Stump, 266 U. S. 310, and the applicable decisions of the United States Supreme Court."

The effect of this amendment is an important question of federal law and should be settled by this Court in order to establish what exemptions are permissible under the Bankruptcy Act as a result of said amendment.

2. The United States Circuit Court of Appeals for the Ninth Circuit held that under the laws of Nevada a *de facto* homestead right subsisted as against execution creditors or a trustee in bankruptcy prior to the filing of a declaration of homestead. Circuit Judge Denman, in his dissenting opinion (R. 81) says:

"The court has decided an important question of local law of Nevada with respect to the right of a wife in a homestead prior to a transfer by operation of the Nevada law, similar to the transfer by operation of law on the filing of a petition in bankruptcy, where the wife has taken no steps to create the homestead prior thereto, in conflict with the applicable Nevada decisions to the contrary."

Prayer:

Wherefore, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Ninth Circuit had in the case numbered on its docket No. 10,028, G. E. Myers, Trustee of the estate of Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store, Bankrupt, Appellant, vs.

Verna May Matley, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such further relief as this Court may deem proper.

Dated, Reno, Nevada,
November 16, 1942.

HARLAN L. HEWARD,
*Counsel for Petitioner
and Appellant.*
PAINTER, WITHERS & EDWARDS,
By T. L. WITHERS,
*Of Counsel for Petitioner
and Appellant.*





In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly doing
business under the name and style
of Matley's Food Store,

Petitioner and Appellant below,

VS.

VERNA MAY MATLEY,

Respondent and Appellee below.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI.

(A) STATUTORY PROVISIONS TO SUSTAIN JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The jurisdiction of the United States Supreme Court is invoked under Section 24c of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U.S.C.A. 347.

(B) OPINIONS BELOW.

The opinion of the United States Referee in Bankruptcy, including an exhaustive analysis of the Nevada statutes and decisions, was entered the 16th day of July, 1941. (R. 15.)

The opinion of the United States District Court for the District of Nevada was entered the 25th day of November, 1941. (R. 44.) This case is not reported.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on September 15, 1942. (R. 66.) This case is not yet reported.

The Petition for Rehearing was denied by the United States Circuit Court of Appeals for the Ninth Circuit on October 26, 1942. (R. 86.)

STATEMENT OF FACTS.

This matter was heard in the United States Circuit Court of Appeals for the Ninth Circuit upon an agreed statement of facts. (R. 51.)

The only facts necessary for the consideration of the question here presented are, that an involuntary petition in bankruptcy was filed on the 24th day of October, 1940 (R. 2); that no declaration of homestead was filed by the bankrupt or by the Respondent, his wife, until the ~~20th~~ day of November, 1940 (R. 10); that although the bankrupt listed said property in his schedules, no homestead exemption was claimed by the bankrupt in his schedules (R. 52); that Petitioner is the duly appointed, qualified and acting trustee in

bankruptcy of Marshall Reno Matley, Bankrupt (R. 52); that the Respondent is the wife of Marshall Reno Matley. (R. 52.)

STATUTES INVOLVED.

The Nevada Constitution and Statutes and the Georgia Constitution and Statutes involved will be found in the Appendix.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that the amendment of the Bankruptcy Act of June 22, 1938, 11 U.S.C.A. 110, wherein Section 70a of the Bankruptcy Act was amended by changing the words "which is exempt" to read "which is held to be exempt" relaxed the rule of *White v. Stump*, 266 U. S. 310, by permitting a bankrupt to establish a right of exemption which was not complete at the time of the filing of the petition in bankruptcy, and in holding that said amendment was for any purpose other than to clarify said section.

2. In holding that under the laws of Nevada a homestead *de facto* existed prior to the filing of a declaration of homestead as against execution creditors, i.e., a trustee in bankruptcy, and/or that the right of a homestead exemption could be perfected after the filing of a petition in bankruptcy. That is, in

holding that the property in question under the Nevada law could not have been sold by execution creditors on the date of the filing of the petition in bankruptcy; and in refusing to consider in any way the only two Nevada cases dealing specifically with this subject, to-wit:

McGill v. Lewis, 116 Pac. (2d) 581;

Lachman v. Walker, 15 Nev. 422.

3. In holding that the case of *Clark v. Nirembaum*, 8 Fed. (2d) 451, was controlling or materially affected the present case in view of the difference between the Georgia and Nevada statutes involved.

ARGUMENT.

I. The Writ should be granted in order that there may be a determination of the question of whether or not the amendment of June 22, 1938, to the Bankruptcy Act, 11 U.S.C.A. 110, whereby Section 70a of said Act was amended by changing the words "which is exempt" to read, "Which is held to be exempt", was merely for the purpose of clarifying that section or whether the amendment actually changed the scope and effect thereof.

The United States Supreme Court, in the case of *White v. Stump*, 266 U. S. 310, clearly analyzed and interpreted the meaning of this section of the Bankruptcy Act prior to the amendment and held that it and certain other sections of the Bankruptcy Act, to-wit, Sections 6, 7, 47a, 70a, and 70c, "show that the point of time which is to separate the old situation

from the new in the bankrupt's affairs is the date when the petition is filed"; and further held that "in our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control and with respect to which the status and rights of the bankrupt and creditors and the trustee and other particulars are fixed. The provisions before cited show—some expressly and others impliedly—that one common point of time is intended and that it is the date of the filing of the petition. The bankrupt's right to control and dispose of the estate terminates as of that time save only as to property 'which is exempt'."

Since that time all cases involving homestead exemptions have been decided under the foregoing doctrine. Petitioner has found no cases holding that the amendment of June 22, 1938, in any way affected the application of Section 70a of the Bankruptcy Act as interpreted by the United States Supreme Court in the case of *White v. Stump*, *supra*.

Likewise, the petitioner has found no text writers that even suggest that this amendment in any way affected the meaning or application of the section.

Remington on Bankruptcy, 4th Ed., Sec. 1178 et seq.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit that this amendment relaxed the rule laid down by the United States Supreme Court in *White v. Stump*, *supra*, which rule has been applied by the United States Circuit Court of

Appeals for the Ninth Circuit in the case of *Georg-houses v. Gillen*, 24 Fed. (2d) 292 (R. 72), and followed in numerous other cases, opens up a wide field of speculation since, under this decision, there is apparently no definite time which can be set as determining when property actually passes to a trustee in bankruptcy. The effect of this decision is that an exemption which was not complete at the time of filing the petition in bankruptcy can be completed and property declared to be exempt after the jurisdiction of the Bankruptcy Court has attached.

Since this is apparently a question of first impression, no specific authority can be quoted.

The dissenting opinion of Circuit Judge Denman with reference to the effect of this amendment upon the Bankruptcy Act clearly and succinctly states your petitioner's position on this question. (R. 81.)

II. The writ should be granted since the decision of the United States Circuit Court of Appeals for the Ninth Circuit that under the laws of Nevada a *de facto* homestead exists as against execution creditors, i.e., a trustee in bankruptcy, and that under Nevada laws the rights of the Respondent in the homestead are thus established to a degree that it can be perfected thereafter, is directly contrary to the Nevada statutes and decisions.

The Constitution of Nevada, Article 4, Section 14 (Appendix), provides:

"A homestead as provided by law *shall be exempt* from forced sale under any process or law and shall not be alienated without the joint consent of both the husband and wife when that relation exists. * * *."

This provision of the Nevada Constitution clearly contemplates that the Nevada Legislature will pass statutes defining and providing for the exemption of a homestead. Such a statute was, in fact, passed by the Nevada Legislature in 1865, and, with certain minor amendments, is now Section 3315 of the Nevada Statutes. (Appendix.)

The Nevada Legislature also passed a general exemption statute wherein the Legislature provided:

"The following property *is* exempt from execution."

As originally passed this section did not refer to the homestead. However, in 1911 paragraph 15, reading:

"And the homestead as provided by law"

was added to this statute. This section is now Section 8844 of the Nevada Statutes. (Appendix.)

It will be noted that the only thing with reference to the exemption of the homestead added by this section to Article 4, Section 30, of the Nevada Constitution is that the Constitution uses the verb "shall be" whereas Section 8844 of the Nevada Statutes uses the verb "is" exempt.

However, both sections specifically refer to the homestead "as provided by law" and hence, both the Nevada Constitution and Section 8844 of the Nevada Statutes must be construed in connection with Section 3315 of the Nevada Statutes, which defined a homestead and requires the filing of a declaration of homestead.

It is true that the Legislature likewise passed Section 3360 which prohibited the alienation of the homestead by mortgage, deed, or other voluntary act of the husband without the consent of the wife. However, this section refers merely to the alienation of the property by the husband and does not in any way refer to the alienation of the property by operation of law, i.e., by sale under execution or petition in bankruptcy, etc.

The United States Circuit Court of Appeals for the Ninth Circuit in its decision relies upon the Nevada case of *First Nat'l Bank of Ely v. Meyers*, 150 Pac. 308 (on rehearing, 161 Pac. 929). This case, however, involved solely the right of a husband to alienate property by his own act without the consent of the wife. In other words, this case involves solely the interpretation of Section 3360 of the Nevada Statutes, and in this case the Nevada Supreme Court very carefully limits the scope of the decision to the question there being considered by saying (161 Pac. 930):

"In the case at bar it must be recalled that we are not dealing with the question of forced sale of a homestead under execution or by final process

from any court for any debt or obligation. We are dealing exclusively with the right of one spouse to alienate a homestead without the joint consent of the other. We are dealing here solely with the question of the validity of an instrument made by the husband without the knowledge, consent or acquiescence of the wife, by which instrument the former alienated at least to the extent of a mortgage, the home which had been at all times and was then, openly and notoriously occupied by, and was the only place of abode for himself, his wife, and his family."

Again, on page 932 the Court in this case says:

"Recordation may be and, in fact, is necessary to give notice to all the world of the selection of the homestead to exempt it from forced sale under execution. But to exempt it from alienation by one spouse without the consent of the other, in the absence of specific constitutional or statutory provision, why should such be necessary?"

The United States Circuit Court of Appeals for the Ninth Circuit, in its majority opinion, refused to consider the two leading Nevada cases dealing specifically with the question of the rights of an execution creditor as against the claim of homestead exemption. In this connection Petitioner admits that under the laws of Nevada as interpreted by the Nevada Supreme Court, a declaration of homestead filed at any time prior to actual execution sale is sufficient to establish the homestead right. On the other hand, the Nevada

Supreme Court, in the case of *McGill v. Lewis*, 116 Pac. (2d) 581, and in the case of *Lachman v. Walker*, 15 Nev. 422, holds specifically as indicated in the dictum of the case of *First Nat'l Bank of Ely v. Meyers*, *supra*, that a valid declaration of homestead must be filed in order to prevent execution sale. Thus, in the case of *Lachman v. Walker*, *supra*, the Court says (p. 923):

"This appeal is from that judgment, and but one question is presented for our consideration, viz.: Is compliance with the first section of the homestead statute (Comp. L. 186) in relation to the manner of selection, a condition precedent to the exemption therein provided, when, as in this case, the premises are actually occupied as the home of the judgment debtor, and might have been selected and held as a homestead according to the provisions of the statute?"

On page 424 the Court further says:

"In this case no declaration has ever been filed, and we have not the slightest doubt that the property is not exempt. *The statute only exempts a homestead which has been selected according to its provisions.* 'The homestead * * * to be selected * * * shall not be subject to forced sale. * * * Said selection shall be made by either husband or wife, or both of them, * * * declaring their intention in writing to claim the same as a homestead.' *The Law does not compel any person to have his property become a statutory homestead, against his will, but requires him to do certain things in order to enjoy its benefits.*'"

Likewise, the Nevada Supreme Court, in the very recent case decided on August 30, 1941, of *McGill v. Lewis*, 116 Pac. (2d) 581, says:

*"To secure the benefits of the Constitutional and statutory provisions exempting the homestead from forced sale under process of law (with certain exceptions not here pertinent), it is necessary that a declaration of homestead be filed for record as provided in Section 3315, N.C.L. 1929. *Lachman v. Walker*, 15 Nev. 422. The case last cited was not overruled in *First Nat'l Bank of Ely v. Meyers*, 39 Nev. 235, 150 Pac. 308; Id., 40 Nev. 284, 161 P. 929. In that case, it is true, no declaration for homestead was filed for record but the question before the court was not as to the exemption of the homestead from forced sale; it was whether the husband alone could mortgage the homestead occupied by him and his family."*

Both of these cases involve the identical question here presented and both hold that a declaration of homestead must be filed to prevent a sale on execution. No Nevada cases hold that a declaration of homestead is not necessary to prevent sale on execution. Consequently, since in the case at Bar no declaration had been filed prior to the sale on execution, that is, prior to the date of the filing of the petition in bankruptcy, the trustee, on the date of the filing of the petition in bankruptcy, as provided by Section 70a of the Bankruptcy Act, acquired absolute title to the property, since the property, on the 24th day of October, 1940, "might have been levied upon and sold under judicial process against him".

III. The Writ should be granted since the case of *Clark v. Nirembaum*, 8 Fed. (2d) 451, does not sustain the majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit. It will be noted that this case was decided under Article 9, Section 1, Paragraph 1, Georgia Constitution, Section 6582, Park's Ann. Code of Georgia, and Section 3416, Park's Ann. Code of Georgia. (Appendix.)

It will also be noted that both the Constitution and the Statutes of Georgia definitely exempt homestead property "from levy and sale by virtue of any process whatever".

The Georgia Statutes and Constitution differ from the Nevada Statutes, since in Nevada "the homestead as provided by law" only is exempt, and the only legal provision with reference to the homestead requires the filing of a declaration of homestead. (Sec. 3315, Nevada Statutes, Appendix.)

Hence, the right to a homestead exemption under the laws of Georgia is clear since in Georgia the exemption "is not property which would or might be exempt if some condition not properly performed were performed, but a property to which there is, under the state law, a present right of exemption; one which withdraws the property from levy and sale under judicial process". Whereas, under the Nevada Constitution and Statutes "the land in question here was not in that situation when the petition was filed. It was not then exempt under the state law but was subject to levy and sale. One of the conditions upon which it

might have been rendered exempt had not been performed. Under the state law the fact that the other conditions were present did not suffice. The concurring presence of all was necessary to complete the homestead exemption." (*White v. Stamp*, *supra*.)

Dated, Reno, Nevada,

November 16, 1942.

Respectfully submitted,

HARLAN L. HEWARD,

*Counsel for Petitioner
and Appellant.*

PAINTER, WITHERS & EDWARDS,

By T. L. WITHERS,

*Of Counsel for Petitioner
and Appellant.*

(Appendix Follows.)

Appendix.



Appendix

Georgia Constitution, Article 9, Sec. 1, Par. 1, Section 6582, Park's Ann. Code of Georgia:

"There shall be exempt from levy and sale by virtue of any process whatever under the laws of this state, except as hereinafter excepted of the property of every head of a family, a guardian or trustee of a family of minor children, or every aged or infirm person, or person having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the value in the aggregate of \$1600.00."

Section 3416, Park's Ann. Code of Georgia, reads:

"The following property of every debtor who is the head of a family, shall be exempt from levy and sale by virtue of any process whatever, under the laws of this state, nor shall any valid lien be created thereon, except in the manner hereinafter pointed out, but it shall remain for the use and benefit of the family of the debtor:

(1) 50 acres of land and 50 additional acres for each of his or her children under the age of 16. This land shall include the dwelling house, if the value of said house and improvements does not exceed the sum of \$200.00 * * * Or, in lieu of the above land, real estate in a city, town or village not exceeding \$500.00 in value."

The Nevada Constitution and Statutes referred to are:

Nevada Constitution, Article 1, Section 14, reads:

"The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by whole-

some laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted; and there shall be no imprisonment for debt, except in cases of fraud, libel or slander, and no person shall be imprisoned for a militia fine in time of peace."

Nevada Constitution, Article 4, Section 30, reads:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by the consent of both husband and wife, and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

Section 3360, Nevada Compiled Laws, reads:

"The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and the wife execute and acknowledge the same as now provided by law for the conveyance of real estate; provided further, that the wife shall have the

entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family."

Section 8844, Nevada Compiled Laws, reads:

"The following property is exempt from execution, except as herein otherwise specifically provided:

1. Chairs, tables, desks, and books to the value of two hundred dollars, belonging to the judgment debtor.
2. Necessary household, table, and kitchen furniture belonging to the judgment debtor * * *
3. The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also, two oxen, or two horses, or two mules, * * *
4. The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public * * *
5. The cabin or dwelling of a miner or prospector, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, * * *
6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, or one motor vehicle, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living * * *

7. Poultry not exceeding in value seventy-five dollars.
8. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment * * *
9. All fire engines, hooks and ladders * * *
10. All arms, uniforms, and accouterments required by law to be kept by any person, and also one gun, to be selected by the debtor.
11. All courthouses, jails, public offices and buildings * * *
12. All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building * * *
13. All machinery, tools and implements necessary in and for boring, sinking, putting down, and constructing surface or artesian wells;
* * *
14. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance * * *
15. *And the homestead as provided for by law.*
16. The dwelling of the judgment debtor occupied as a 'home for himself and family, where said dwelling is situate upon lands not owned by him'.

No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment to recover for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon."

Section 3315, Compiled Laws of Nevada, reads:

"The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from any court, for any debt or liability contracted or incurred after November thirteenth, in the year of our Lord one thousand eight hundred and sixty-one, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon; or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. Said selection shall be made by either the husband or wife or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state when made by a married person or persons that they or either of them are married, or if not married, that he or she is the head of a family, and they or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as

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joint tenants; provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgment of the declaration; and if such property shall retain its character of separate property until the death of one or the other of such spouses, then and in that event the homestead right shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead; and, provided further, that tenants in common may declare for homestead rights upon their respective estates in lands, and the improvements thereon; and hold and enjoy homestead rights and privileges therein, subject to the rights of their co-tenants, to enforce partition of such common property as in other cases of tenants in common."



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RENO, NEV.

DEC 28 1942

CHARLES ELHORE MATLEY
OCEANIC

The Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly doing
business under the name and style of
Matley's Food Store,

Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,

Respondent and Appellee below.

RESPONDENT'S BRIEF

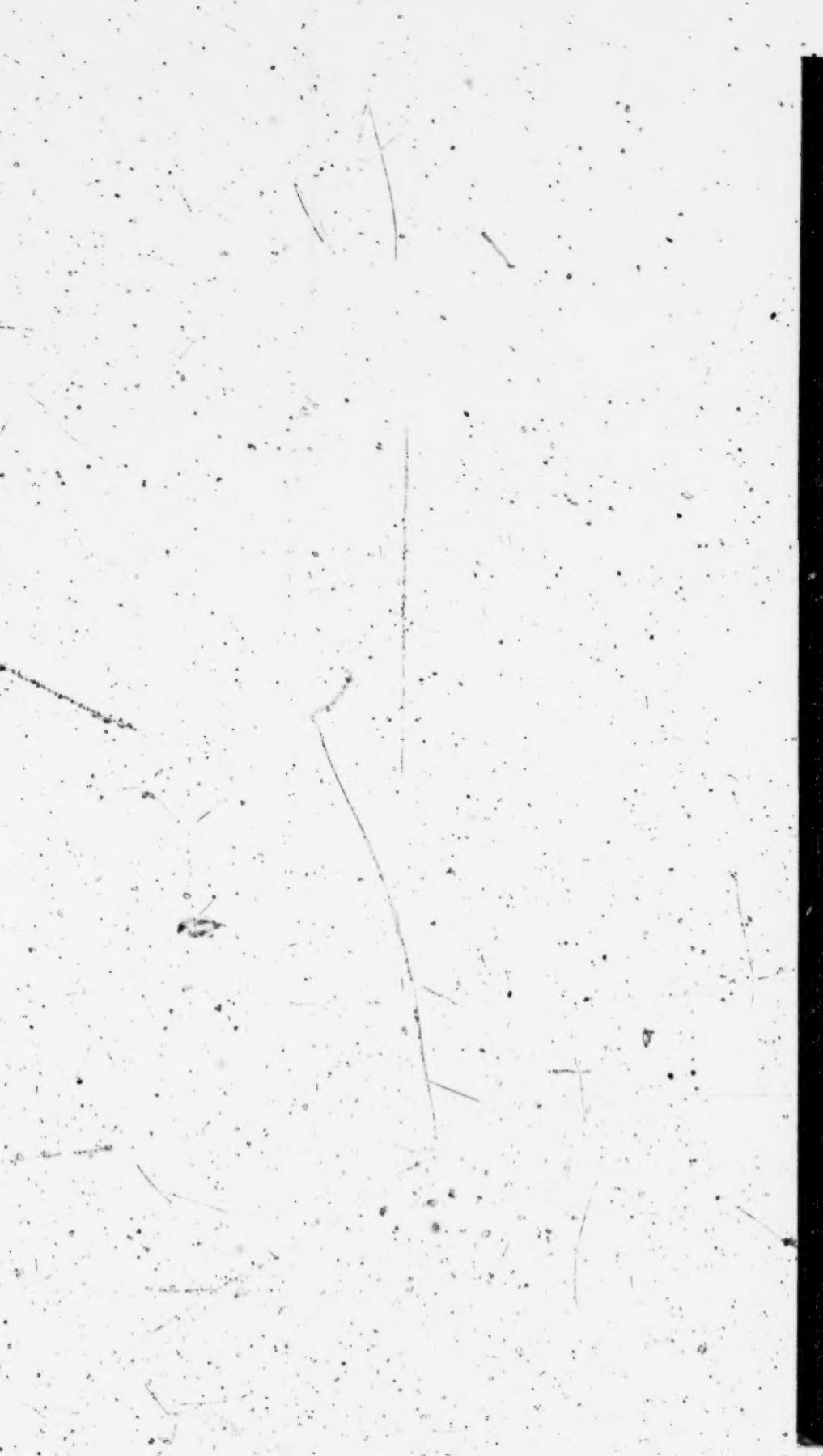
in Opposition to Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Ninth Circuit

WILLIAM M. KEARNEY,

Counsel for Respondent.

ROBERT TAYLOR ADAMS,

Of Counsel for Respondent.



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The Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly doing
business under the name and style of
Matley's Food Store,

Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,

Respondent and Appellee below.

RESPONDENT'S BRIEF

in Opposition to Petition for Writ of Certiorari
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Supreme Court of the United States and to
the Honorable Harlan Fiske Stone, Chief Justice of
the United States, and to the Associate Justices of
the Supreme Court of the United States:

OPINIONS DELIVERED IN COURTS BELOW

One opinion was delivered by the United States District Court for the State of Nevada. It was written by District Judge Frank H. Norcross, former Chief

Justice of the State of Nevada, and entered November 25, 1941. The opinion was not reported but is set forth at page 44 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (Circuit Judges Garrecht, Denman, and Healy, Judge Healy writing; Judge Denman dissenting) was entered on September 15, 1942. The opinion is set forth at page 66 of the record and is reported in 130 Fed. (2nd) 775. The Circuit Court denied a rehearing October 26, 1942 (R. 86).

JURISDICTION

The jurisdiction of the United States Supreme Court is sought to be invoked under Section 24e of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U. S. C. A. 347.

STATEMENT OF FACTS

The master was heard before the Circuit Court on appellant's statement of facts (R. 51). The facts set forth in the petition at page 8 are correct but incomplete. The following facts should be noted and are essential to consideration of the question involved whether it be as stated by petitioner or as stated by respondent.

The bankrupt and his wife at all times considered the property to be their home, (R. 53, 55, 67). The wife was residing on the premises at the time of the filing of the bankruptcy, (R. 54). The District Court of the State of Nevada (R. 55) recognized the premises as having been the homestead of bankrupt and his wife

for several years. (Petitioner herein was not a party to the suit nor were the respective rights of petitioner and respondent litigated therein.) The bankrupt was guilty of extreme cruelty toward his wife, (R. 54). The adjudication of bankruptcy was consented to by the bankrupt the day the petition was filed, (R. 51). Although the property was considered as their home for several years, the bankrupt made no claim for exemption of the homestead (R. 7, 52). The wife filed the formal declaration of homestead (R. 54) and claimed the homestead exemption in the bankruptcy proceedings (R. 7).

The additional facts included in the respondent's statement of the question and those added to the Statement of Facts are necessary as they present a factual situation under which the Nevada law affords a protection to the wife which is lacking in many other jurisdictions. The Nevada law, and it alone, determines the exemption (Section 6, Bankruptcy Act, 11 U. S. C. A. 24).

QUESTION PRESENTED

The Circuit Court stated the question as follows (R. 67):

"The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt."

Petitioner had similarly stated the question in his appeal to the Circuit Court (R. 57).

The Question Presented as now set forth by petitioner (page 3) is not adequate as it refers to section 70a of the Bankruptcy Act and omits reference to other sections of the Act (e.g. 6 and 7a (8), 11 U. S. C. A. 24 and 25) considered and relied on below and omits certain relevant facts. It is likewise faulty in that it implies that the Circuit Court's decision rests necessarily on its interpretation of Section 70a. (See opinion at R. 72.)

The question may, without unnecessary listing of sections of the Act, be stated as follows:

Whether, under the statutes, decisions and policy of the State of Nevada, in light of the fact that the formal homestead declaration was not filed until after the filing of the bankruptcy petition, the wife of the bankrupt is entitled to have the property excluded as exempt, the property having been considered by the parties for several years as their home and having been used and claimed by the claimant as a homestead at the time of the filing of the bankruptcy petition, and a timely claim of exemption having been made in the bankruptcy proceedings by the wife, the bankrupt having failed to take any action in the proceedings to designate the property as exempt property or to protect such interest as the wife had therein.

The question may also be stated as follows:

Whether, in Nevada, a wife can protect her homestead rights by making a timely claim in a bankruptcy proceeding against her husband for recognition of her homestead exemption and to identify it so as to have

it excluded as exempt, where no formal declaration of homestead was filed prior to her husband's bankruptcy and where the wife was residing on the premises and claiming it as her homestead at the time of the filing of the bankruptcy petition and where the husband wilfully failed to take any action to protect such interest as the wife had.

STATUTES

The relevant provisions of the Nevada Constitution and statutes are set forth in the petitioner's Appendix. Relevant provisions of the Bankruptcy Act and of states other than Nevada are set forth in the Appendix at the end of this brief. Section 8846 Nevada Compiled Laws, 1929; is also set forth therein.

ARGUMENT

A. Correction of Statements as to Circuit Court's Holding

In number 1 of "Petitioner's Reasons Relied on for the Issuance of the Writ" at page 4, and in the "Specification of Errors" at pages 9 and 10, petitioner incorrectly states the holding of the Circuit Court. A correction is necessary to properly determine if this case is one of the character and importance to justify certiorari. Also, the incorrect statement implies a conflict, which, under a correct statement of the holding of the Circuit Court, is non-existent. (In no way, of course, do we intend to suggest that there is any intentional mis-statement of the Circuit Court's holding.)

At page 4, as one of the reasons for issuance of the

Writ, petitioner represents that the Circuit Court held that the 1938 amendment to Section 70a relaxed the rule of *White v. Stump*:

—“and permitted a bankrupt to establish a right of exemption after the filing of the petition in bankruptcy.”

Also, at page 9 in the Specification of Errors, petitioner states that the Court held that the amendment relaxed that rule—

—“by permitting a bankrupt to establish a right of exemption which was not complete at the time of the filing of the petition in bankruptcy.”

Also, the second specification of error states that the Court held:

—“that the right of a homestead exemption could be perfected after the filing of a petition in bankruptcy.”

The Court did not so hold. The Court stated (R. 71):

“We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under present law the opportunity to identify or select exempt property is irretrievably cut off as of that date.”

Throughout the opinion (e.g. R. 68, 71, 74, 75), the Circuit Court recognizes and points out that under the Nevada law the exemption and exemption right exist even though the same might be lost by execution sale if the property were not identified or selected.

Such incorrect statement of the Circuit Court's holding just pointed out is repeated and made the funda-

mental basis of petitioner's argument on pages 12 to 19.

At pages 9 and 10 under the second specification of error, it is stated that the Circuit Court held

—“that the property in question could not have been sold by execution creditors on the date of the filing of the petition in bankruptcy;”

The Court did not so hold. It stated (R. 74):

“Until the selection is made—and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale;”

The Court also stated (R. 68):

“Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt.”

At page 10 it is stated that the Court refused to consider “in any way” two Nevada cases. One, the *Lachman* case, is cited by the Court. The rule of those cases and its applicability to this case are also considered (R. 68, 73, 74, 75) without specific reference to the cases by name.

I. Answer to Petitioner's First Point

Petitioner's contention that the Circuit Court's holding and interpretation of section 70a permits the creation of a homestead right after bankruptcy which was non-existent before, and such holding is therefore in conflict with *White v. Stump*, is based on an incorrect analysis of the Circuit Court's holding.

Petitioner's point I. in his argument (page 10) deals with the Circuit Court's interpretation of the 1938

amendment to section 70a of the Bankruptcy Act (11 U. S. C. A. 110). *White v. Stump*, 226 U. S. 310, and *Georgouses v. Gillen*, 24 F. (2d) 292, Ninth Circuit, cited by petitioner at pages 11 and 12, were both decided before the amendment. Petitioner concedes that there are no cases other than the instant case dealing with the amendment. There is, therefore, no conflict in the decision as to the meaning of the amendment.

Petitioner contends that under the Circuit Court's decision there is apparently no definite time which can be set as determining when property actually passes to the trustee and a wide field of speculation is thereby opened up. Such contention misapprehends the Court's decision, as the Court did not make such time indefinite. On the contrary, the Court held in discussing the amendment (R. 71):

"We entertain no doubt that *now, as heretofore*, the necessary factual basis precedent to the exercise of the right of selection must exist *as of the date of bankruptcy;*" (Italics added.)

There is no uncertainty in section 70a, either before or after the amendment, as to when property passes to the trustee. It provided and still provides that upon the trustee's appointment and qualification, he is vested with the bankrupt's title as of the date of adjudication of bankruptcy. The bankrupt's title to exempt property never passed to the trustee. Before the amendment this exception was stated:

"except in so far as it is to property which is exempt,"

After the amendment it read:

"except insofar as it is to property which is held to be exempt."

The Circuit Court's decision created no field for speculation. As quoted above, it recognized that both before and after the amendment—

"the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; *but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date.*"

(Italics added.)

It is thus clearly apparent that while the date of bankruptcy is a line of demarkation, it is a date at which the *factual basis* precedent to the exercise of the right of selection must exist. Petitioner contends directly, and by reference (page 12) to the dissent below, that the Circuit Court's decision created or would permit the creation of a homestead and homestead right after the date of bankruptcy. It appears from the above quotation and elsewhere in the opinion that the Circuit Court did not so hold. As pointed out in the italicized portion, it is even clearer now than before the amendment that the *right to identify or select* the exempt property is not cut off by the bankruptcy.

What the Courts below in this case held was that the factual basis did exist and the wife did have the right of selection at the time of the bankruptcy.

Now, the determination of whether the factual basis and the right of identification existed in this particular

case is not a matter of appeal to the discretion of the United States Supreme Court so as to warrant the granting of Certiorari to see if that determination were correct. Such question, when it is seen what the question actually is, is not of the importance which will justify the issuance of the writ. As stated by Justices Brandeis and Holmes in Justice Brandeis' dissent in *Sultan Ry. & T. Co. v. Department of Labor and Industry*, 277 U. S. 135, 72 L. Ed. 820:

"Treating these writs of error as petitions for certiorari ***, we think that the petitions should be denied. *** It is true that each of these cases presents a question involving the Federal Constitution. But in both the controlling principle is well settled, and the question presented is simply whether on the particular facts it is applicable. Obviously such a question is of no general importance."

Petitioner refers with approval (page 12) to the dissent below. With due and sincere respect to its learned author, we suggest that a straw man is being destroyed in the dissent's discussion of the majority's holding on this point. We do not understand that we are called upon to discuss the dissent in detail because of petitioner's mere reference to it. We feel that the following may, however, save time in the comparison of the two opinions.

The Circuit Court did not (as the dissent suggested, that it did—R. 81, 83) hold that the homestead and the exemption right may be created after the bankruptcy.

The Circuit Court did not (as the dissent suggested, it did—R. 82) hold that Congress intended to "ameliorate" the position of the wife, a third person. The Cir-

Circuit Court made no reference to the wife in considering the amendment. It did refer to the wife's position in considering the Nevada law. The differentiation of *White v. Stump* is based on the differences of the Idaho law considered in that case from the Nevada law involved in the instant case.

The dissent states (R. 83) that under the majority opinion the claimant could wait at his will to create his exemption, perhaps for years. The Circuit Court did not hold or imply that the exemption could be "created" after the date of bankruptcy. It held that the exempt property could be identified or selected after such date. As to delay, the Circuit Court did not hold that the time to so identify or select was unlimited. In fact, the Bankruptcy Act itself sets the time within which the exemptions shall be claimed (Section 7a (8), 11 U. S. C. A. 25). Such time does not, and would not, extend beyond a reasonable period for amendment of schedules. This has been and is the law.

The dissent's discussion of a necessity for an "adjudication" of exemptions (R. 82, 85) is of interest but not relevant to petitioner's reasons for the issuance of certiorari. The procedure provided by statute is for the trustee to promptly set aside the exemptions allowed by law, if claimed, and report thereon to the courts (Bankruptcy Act 47a (6), 11 U. S. C. A. 75). The question of procedure is not involved herein. The Circuit Court in this connection was merely pointing out the significance of the amendment with reference to the right of designation and as to when such designation may be made. It was not considering the exist-

ence of an exemption with relation to the time of such adjudication. In other words, the dissent is suggesting an interpretation of the amendment which may or may not be correct, but which is not necessarily opposed to the Circuit Court's interpretation.

Lastly, the dissent states (R. 83) that the Circuit Court decided that the holding of *White v. Stump* prevents the selection of barber's tools, etc., permitted by state exemption statutes. The Circuit Court did not so decide, but held (R. 74) that if the right of designation were cut off by bankruptcy as contended by petitioner the state exemption law would be nullified. The Court then pointed out, (R. 75) that such exemption statute in Nevada included the homestead (Section 8844 (15) Nevada Compiled Laws, 1929).

We have ventured the above remarks as to the dissent as we believe them relevant to petitioner's claim and the dissent's statement that the Court's decision conflicts with *White v. Stump*. (See petitioner's Reasons Relied on for the Issuance of the Writ, page 4.)

Because petitioner has cited and relies on *White v. Stump*, arising in Idaho, and *Georgous v. Gillen* (supra), arising in Arizona, rather than because of any belief on our part that those cases are relevant to the issuance of certiorari on the basis of conflict between federal courts, we note the following, which is, however, clearly relevant to petitioner's point II. discussed below.

Both the Idaho and Arizona statutes provide that the homestead does not exist nor is it created until the

filling of a formal declaration. (See above cases for statement of state law; also 5465 and 5469 Idaho Comp. Stat.; 3292 Rev. Stat. of Arizona.) Neither state has a provision such as 8844 (15) Nevada Compiled Laws, 1929, which is a self-executing exemption statute including the homestead among its *present* exemptions. Idaho and Arizona lack statutory and judicial declaration of the protected status of the wife such as has been given in Nevada. (See above references and compare with 3360, 8844 (15), 9882.112 and 9882.113, Nevada Compiled Laws 1929, *Hawthorne v. Smith*, 3 Nev. 182, *First Nat. Bank v. Meyers*, 39 Nev. 235 at 247, 150 Pae. 308 at 312, and see analyses of District Court, R. 46, and Circuit Court, R. 69, 72.) The *Georgouses* case did not involve a wife's rights, and, according to the opinion therein, the property "admittedly" had no homestead status at the time of bankruptcy.

II. Answer to Petitioner's Second Point

Petitioner's point II (page 12) deals with the Nevada law. We have hereinabove (page 5) suggested wherein we believe petitioner's statement as to what the Circuit Court held is in error. We emphasize that correction without here repeating it. We also refer to the above citations contrasting the Idaho and Arizona statutes with those of Nevada.

Section 8844 (15) Nevada Compiled Laws, 1929, (set forth in petitioner's Appendix) provides:

"The following property is *exempt* from execution,
— 15. And the homestead as provided for by
law." (Italics added.)

Petitioner's contention is that the words "as provided for by law" mean a homestead upon which a formal declaration has been filed in accordance with Section 3315 Nevada Compiled Laws, 1929, so that if such declaration was not filed before bankruptcy, the homestead and its exemption did not exist.

The Nevada decisions and statutes show that these words do not have such significance. On rehearing of *First Nat. Bank v. Meyers*, 40 Nev. 284, 161 Pac. 929, at page 930, the Court was considering the contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed. The Court stated:

"Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can be effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the Court:

"the Constitution says: 'Laws shall be enacted providing for the recording of such a homestead.' What homestead? The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land, together with a dwelling house thereon,'."

(The homestead is so defined today in section 3315, which is the law of 1865 referred to. The section is set out in petitioner's Appendix.)

Following the above statement of the respondent's

contention, the Nevada Supreme Court makes extensive citation of cases to show that it has been repeatedly held in cases involving the matter of forced sale under execution that words such as "to be selected" have no significance where there is actual occupancy and the value and quantity is as prescribed (in other words, where the factual basis exists). The Nevada court quotes the following with approval:

"The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to *distinguish* that which is *exempt* from that which may be sold at the instance of creditors." (Italics added.)

In addition to the Court's declaration in the Meyers case that a homestead "as provided by law" means the land and house and not a homestead which has been recorded, we call attention to Section 3360 Nevada Compiled Laws, 1929, referring to the wife's rights in the—

"homestead as now defined by law regardless of whether a declaration thereof has been filed or not."

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Section 9882.112 Nevada Compiled Laws, 1929, (1941 Stats. 186) provides that the Court or judge shall set apart—

"the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

The following section (9882.113) gives a similar recognition:

"If the whole property exempt by law be set apart, and should not be sufficient *** the district court or judge shall make such reasonable allowance ***"

In speaking of *First Nat. Bank v. Meyers* (supra) the Circuit Court comments:

"Thus, in the situation and for the purposes contemplated by this statute, a *de facto* homestead right subsists in the wife independently of the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy."

It may be stated therefore, that if, as in the instant case, the factual basis exists in Nevada before the bankruptcy, the homestead and the homestead right exist at that time. Neither the homestead nor the homestead right are created in Nevada by the filing of a formal declaration any more than they are created by a claim of exemption in bankruptcy proceedings. The Circuit Court herein held that where the factual basis exists there is no reason why the bankruptcy proceedings cut off the wife's right to identify the exempt property.

The *Meyers* case (supra) is of further interest in that it announces the state's policy as to protecting the wife's interest in the homestead. The Nevada Supreme Court stated:

"It is manifest that the policy sought to be established by the legislature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics added.)

The policy of the Nevada law as to creditors is stated in *Hawthorne v. Smith*, 3 Nev. 182:

"If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right."

As we have seen, Section 8844 (15) makes the homestead (that is, the house and land irrespective of any recording) presently exempt by virtue of the statutory declaration.

Nevada cases dealing with Section 8844 (all of which were decided before 1911 when subsection 15 was added) recognize that the property listed in that section was made presently exempt by the section, even though it had not been formally claimed or designated. See *Elder v. Williams*, 16 Nev. 423, *Elder v. Frevert*, 18 Nev. 446, and *Edgecomb v. His Creditors*, 19 Nev. 149. For example, in the last case, the Court held that a livery stable keeper was not one included in the terms of the statute, and stated:

"If respondent had been engaged in a business that entitled him to claim the exemption, the property would be exempt, ***." (Italics added.)

Section 8844 was apparently passed pursuant to ar-

title I section 14, of the Nevada Constitution (set forth in petitioner's Appendix). A statute similar to section 8844 and passed pursuant to a similar constitutional provision has been held to be self-executing and to exempt the homestead. *Hughes v. Newton*, 89 Fed. 213. The wife's claim of exemption was therein upheld as against the husband's creditors.

The Circuit Court's decision is not in conflict with the two Nevada cases cited by petitioner. They were impliedly differentiated by the Court in its recognition and discussion of the fact that the homestead and the homestead right exist in Nevada (when, as here, there is the necessary factual basis) even though a designation might be necessary to prevent the exemption being lost by sale.

In addition to this, however, in *neither* of the cases (*Lachman v. Walker*, 15 Nev. 422, and *McGill v. Lewis*, 116 Pac. (2nd) 581) was section 8844 (15) before the Court nor did the Court consider it. The *Lachman* case was decided in 1880 and long before its enactment. Whatever inference may be drawn from the language of the Court as to the law at that time, it is clear that the homestead and the homestead right now exist independent of recording. This is true whether or not the actual holding of the case is still law. There is, as the Circuit Court shows, nothing inconsistent between the rule that an exemption exists and the rule that the exempt property must be designated or the right will be waived. It certainly cannot be said that the case involves the "identical question" as in this

case. The Circuit Court stated the ruling of the Lachman case:

"Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. Lachman v. Walker, 15 Nev. 422."

A further important distinction is that in the Lachman case the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to vitiate the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors*. There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone.

The rights of a wife were not involved in the Lachman case. There has been *no* Nevada case reported where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed.

The *McGill* case is no exception. That case decided that the form and contents of the formal declaration did not comply with Section 3315 as it failed to state that the claimant was residing on the premises. There was no bill of exceptions before the court, but only the judgment roll which showed that claimants were *not* residing on the premises at the time of sale, but were residing in another county. There was, therefore, nothing on which to base an exemption. The Court expressly stated that because of the state of the record before it, it could not consider or decide what the legal effect

of further showing of fact might be. In other words, the *factual basis* for a homestead was affirmatively shown to be lacking. We have already commented that Section 8844 (15) was not before the Court. Also the same and fundamental differentiation pointed out above as to the Lachman case is equally applicable to the McGill case. The McGill case did not hold that the property was not exempt prior to formal recordation. Apart from any other factor, the clear distinction between the existence of an exemption and the necessity of designating exempt property before sale would distinguish the McGill case from the Circuit Court's decision.

Petitioner's contention as to the trustee's position under Section 70a (5) of the Bankruptcy Act as applied to Nevada law is so completely and succinctly answered by the Circuit Court that we feel it is only necessary to refer to the opinion. (See R. 73, 74, and 71 (130 Fed. (2d) at page 777, headnote 2, and at page 777, headnote 6.)

It is to be noted that under the laws of Nevada a debtor or his wife must be given at least twenty days notice before an execution sale takes place, in which time action may be taken to protect the homestead. (Section 8846 Nevada Compiled Laws, 1929). If petitioner's contention were correct no notice or time whatsoever would be afforded the wife in any bankruptcy proceedings by or against her husband. It is undisputed that the state law controls as to exemptions.

Furthermore, under the Nevada law, at no time could

the husband alone, directly or indirectly, have effectively transferred the property without the wife's signature and consent so as to defeat her homestead (3360 Nevada Compiled Laws, 1929; *First Nat. Bank v. Meyers*, supra.)

Petitioner in effect contends that, notwithstanding the Nevada law, the law could be circumvented and her right could be defeated by the husband's voluntary or involuntary bankruptcy.

III. Answer to Petitioner's Third Point

The contentions made under petitioner's point III at page 18 have been answered by the discussion of the above points. Petitioner states his third point as follows:

"The writ should be granted since the case of *Clark v. Nirenbaum*, 8 Fed. (2d) 451, does not sustain the majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit."

We do not understand that such contention, even if it were correct, would justify or be a reason for the issuance of certiorari (United State Supreme Court Rule 38 (5)).

The Clark case is cited twice by the Circuit Court (R. 71, 75; 130 Fed. (2d) 778, 779). We have already pointed out that in Nevada, as in Georgia, the homestead and the homestead right exist independent of formal declaration. The Clark case holds, under the doctrine of *White v. Stump*, that the designation or selection of such property may be made after bankruptcy.

CONCLUSION

In conclusion, it is submitted that there is no occasion or desirability for the issuance of certiorari or further review. The case is important, but only in a very limited field, to-wit, bankruptcy cases arising in the State of Nevada where the bankrupt's wife claims as exempt a homestead on which no formal declaration has been filed. Though such facts may recur, it seems unlikely. There is admittedly no conflict in the cases as to the Circuit Court's interpretation of 1938 amendment to Section 70a. When the Court's interpretation is considered in the light of its actual limited holding and its possible effect on future cases, it does not seem a question which need be passed on by the Supreme Court.

In no way do we deem that the Circuit Court's decision in this case is in conflict with *White v. Stump*. Nor do we believe that the decision conflicts with applicable local decisions.

In short, the case is important only to the parties, particularly the respondent, and as a guide in future bankruptcy cases in Nevada which may present similar facts. Except as to the Court's interpretation of Section 70a (and that incidental ruling would not justify certiorari) the case is only the application of established rules to particular facts. It is respectfully submitted that the writ should be denied.

WILLIAM M. KEARNEY,
Attorney for Respondent.

ROBERT TAYLOR ADAMS,
Of Counsel for Respondent.

APPENDIX

Section 6 of the Bankruptcy Act (11 U. S. C. A. 24) reads:

"This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their ~~domicile~~ for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

The relevant portion of Section 7 of the Bankruptcy Act (11 U. S. C. A. 25 (8)) reads:

"The bankrupt shall *** (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their

residence; if known, or if unknown that fact to be stated; the amount due to or claimed by each of them; the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated, or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided*, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; ***

The relevant portion of Section 47 of the Bankruptcy Act (11 U. S. C. A. 75a. (6)) reads:

"Trustees shall *** (6) set apart the bankrupts exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; ***

The relevant portion of Section 70 of the Bankruptcy Act (11 U. S. C. A. 110a. (5)) now reads:

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all *** (5) property,

including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: ***"

(Note: The italicized portion above, prior to the 1938 amendment, read: "which is exempt,")

The Appendix to petitioner's brief sets forth Article I, Section 14 and Article IV, Section 30 of the Nevada Constitution. It also sets forth Sections 3360, 8844, and 3315, Nevada Compiled Laws, 1929.

The relevant portion of Section 8846, Nevada Compiled Laws, 1929, reads:

"Before the sale of property on execution, notice thereof shall be given as follows: *** 3. In case of real property, by posting a similar notice particularly describing the property, for twenty days, successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and also by publishing a copy of said notice once a week, for the same period, in a newspaper, if there be one, in the county; ***"

The relevant portion of Section 5465, Idaho Comp. Stat., reads:

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 Idaho Comp. Stat. reads:

"From and after the time the declaration is filed for record the land described therein is a homestead."

The relevant portion of Section 3292 R. S. 1913, Arizona (1733 Rev. Code 1928) reads:

"Exempt from time of filing. The homestead shall, from the date of recording the claim, be exempt from attachment, execution and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, ***"





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CHARLES ELMORE GROPLEY
CLERK

The Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly doing
business under the name and style of
Matley's Food Store,

Petitioner and Appellant below.

vs.

VERNA MAY MATLEY,

Respondent and Appellee below.

RESPONDENT'S BRIEF

on Writ of Certiorari to the United States
Circuit Court of Appeals for the
Ninth Circuit

WILLIAM M. KEARNEY,
(Of Reno, Nevada);
Attorney for Respondent.

ROBERT TAYLOR ADAMS,
(Of Reno, Nevada),

BAKER, SELBY & RAVENEL,
(Of Washington, D. C.),
Of Counsel for Respondent.

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The Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 540

G. E. MYERS, Trustee of the estate of
Marshall Reno Matley, formerly doing
business under the name and style of
Matley's Food Store,

Petitioner and Appellant below,

vs.

VERNA MAY MATLEY,

Respondent and Appellee below.

RESPONDENT'S BRIEF
on Writ of Certiorari to the United States
Circuit Court of Appeals for the
Ninth Circuit

*To the Supreme Court of the United States and to
the Honorable Harlan Fiske Stone, Chief Justice of
the United States, and to the Associate Justices of
the Supreme Court of the United States.*

OPINIONS DELIVERED IN COURTS BELOW

One opinion was delivered by the United States Dis-
trict Court for the State of Nevada. It was written
by District Judge Frank H. Norcross, former Chief

Justice of the State of Nevada, and entered November 25, 1941. The opinion was not reported but is set forth at page 44 of the Record.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (Circuit Judges Garrecht, Denman, and Healy, Judge Healy writing; Judge Denman dissenting) was entered on September 15, 1942. The opinion is set forth at page 66 of the record and is reported in 130 Fed. (2nd) 775. The Circuit Court denied a rehearing October 26, 1942 (R. 86).

JURISDICTION

The jurisdiction of the United States Supreme Court is sought to be invoked under Section 24c of the Bankruptcy Act and under Section 240a of the Judicial Code, 28 U. S. C. A. 347.

PRELIMINARY STATEMENT

The petitioner has not filed any brief in this matter as required by Rule 27 of this court. Therefore, respondent's brief will, of necessity, be directed to the points raised in the petition for certiorari and in the Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS

The matter was heard before the Circuit Court on appellant's statement of facts (R. 51). The facts set forth in the petition at page 8 are correct but incomplete. The following facts should be noted and are essential ~~to~~ consideration of the question involved whether it be as stated by petitioner or as stated by respondent.

The bankrupt and his wife at all times considered the property to be their home, (R. 53, 55, 67). The wife was residing on the premises at the time of the filing of the bankruptcy, (R. 54). The District Court of the State of Nevada (R. 55) recognized the premises as having been the homestead of bankrupt and his wife for several years. (Petitioner herein was not a party to the suit nor were the respective rights of petitioner and respondent litigated therein.) The bankrupt was guilty of extreme cruelty toward his wife, (R. 54). The adjudication of bankruptcy was consented to by the bankrupt the day the petition was filed, (R. 51). Although the property was considered as their home for several years, the bankrupt made no claim for exemption of the homestead (R. 7, 52). The wife filed the formal declaration of homestead (R. 54) and claimed the homestead exemption in the bankruptcy proceedings (R. 7).

The additional facts included in the respondent's statement of the question and those added to the Statement of Facts are necessary as they present a factual situation under which the Nevada law affords a protection to the wife which is lacking in many other jurisdictions. The Nevada law, and it alone, determines the exemption (Section 6, Bankruptcy Act, 11 U. S. C. A. 24).

QUESTION PRESENTED

The Circuit Court stated the question as follows (R. 67):

"The question before us is whether, in light of the fact that the homestead declaration was not filed until after the filing of the bankruptcy petition, the wife is entitled to have the property excluded as exempt."

Petitioner had similarly stated the question in his appeal to the Circuit Court (R. 57).

The Question presented as now set forth by petitioner (page 3, petition for writ) is not adequate as it refers to section 70a of the Bankruptcy Act and omits reference to other sections of the Act (e.g. 6 and 7a (8), 11 U. S. C. A. 24 and 25) considered and relied on below and omits certain relevant facts. It is likewise faulty in that it implies that the Circuit Court's decision rests necessarily on its interpretation of Section 70a. (See opinion at R. 72.)

The question may, without unnecessary listing of sections of the Act, be stated as follows:

Whether, under the statutes, decisions and policy of the State of Nevada, in light of the fact that the formal homestead declaration was not filed until after the filing of the bankruptcy petition, the wife of the bankrupt is entitled to have the property excluded as exempt, the property having been considered by the parties for several years as their home and having been used and claimed by the claimant as a homestead at the time of the filing of the bankruptcy petition, and a timely claim of exemption having been made in the bankruptcy pro-

ceedings by the wife, the bankrupt having failed to take any action in the proceedings to designate the property as exempt property or to protect such interest as the wife had therein.

The question may also be stated as follows:

Whether, in Nevada, a wife can protect her homestead rights by making a timely claim in a bankruptcy proceeding against her husband for recognition of her homestead exemption and to identify it so as to have it excluded as exempt, where no formal declaration of homestead was filed prior to her husband's bankruptcy and where the wife was residing on the premises and claiming it as her homestead at the time of the filing of the bankruptcy petition and where the husband wilfully failed to take any action to protect such interest as the wife had.

STATUTES

The relevant provisions of the Nevada Constitution and statutes are set forth in the Appendix. Relevant provisions of the Bankruptcy Act and of states other than Nevada are set forth in the Appendix at the end of this brief. Section 8846 Nevada Compiled Laws, 1929, is also set forth therein.

ARGUMENT

A. Correction of Statements as to Circuit Court's Holding

In number I of "Petitioner's Reasons Relied on for the Issuance of the Writ" at page 4, and in the "Specification of Errors" at pages 9 and 10, petitioner in-

correctly states the holding of the Circuit Court, in that it implies a conflict, which, under a correct statement of the holding of the Circuit Court, is non-existent. (In no way, of course, do we intend to suggest that there is any intentional mis-statement of the Circuit Court's holding.)

At page 4, as one of the reasons for issuance of the Writ, petitioner represents that the Circuit Court held that the 1938 amendment to Section 70a relaxed the rule of *White v. Stump*:

—“and permitted a bankrupt to establish a right of exemption after the filing of the petition in bankruptcy.”

Also, at page 9 in the Specification of Errors, petitioner states that the Court held that the amendment relaxed that rule—

“by permitting a bankrupt to establish a right of exemption which was not complete at the time of the filing of the petition in bankruptcy.”

Also, the second specification of error states that the Court held:

—“that the right of a homestead exemption could be perfected after the filing of a petition in bankruptcy.”

The Court did not so hold. The Court stated (R. 71):

“We entertain no doubt that now, as heretofore, the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under present law the opportunity to identify or select exempt property is irretrievably cut off as of that date.”

Throughout the opinion (e.g. R. 68, 71, 74, 75), the Circuit Court recognizes and points out that under the Nevada law the exemption and exemption right exist even though the same might be lost by execution sale if the property were not identified or selected.

Such incorrect statement of the Circuit Court's holding just pointed out is repeated and made the fundamental basis of petitioner's argument on pages 12 to 19 of his brief which accompanied his petition.

At pages 9 and 10 under the second specification of error, it is stated that the Circuit Court held

—“that the property in question could not have been sold by execution creditors on the date of the filing of the petition in bankruptcy;”

The Court did not so hold. It stated (R. 74):

“Until the selection is made—and there is often no statutory machinery for making it—the exemption statute is as a matter of practical necessity no impediment to levy and sale;”

The Court also stated (R. 68):

“Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt.”

At page 10 it is stated that the Court refused to consider “in any way” two Nevada cases. One, the *Lachman* case, is cited by the Court. The rule of those cases and its applicability to this case are also considered (R. 68, 73, 74, 75) without specific reference to the cases by name:

I. Answer to Petitioner's First Point

Petitioner's contention that the Circuit Court's holding and interpretation of section 70a permits the creation of a homestead right after bankruptcy which was non-existent before and such holding is therefore in conflict with *White v. Stump*, is based on an incorrect analysis of the Circuit Court's holding.

Petitioner's point I. in his argument (page 10) deals with the Circuit Court's interpretation of the 1938 amendment to section 70a of the Bankruptcy Act (11 U. S. C. A. 116). *White v. Stump*, 226 U. S. 310, and *Georgouses v. Gillen*, 24 F. (2d) 292, Ninth Circuit, cited by petitioner at pages 11 and 12, were both decided before the amendment. Petitioner concedes that there are no cases other than the instant case dealing with the amendment. There is, therefore, no conflict in the decisions as to the meaning of the amendment.

Petitioner contends that under the Circuit Court's decision there is apparently no definite time which can be set as determining when property actually passes to the trustee and a wide field of speculation is thereby opened up. Such contention misapprehends the Court's decision; as the Court did not make such time indefinite. On the contrary, the Court held in discussing the amendment (R. 71):

"We entertain no doubt that *now, as heretofore*, the necessary factual basis precedent to the exercise of the right of selection must exist *as of the date of bankruptcy*;" (Italics added.)

There is no uncertainty in section 70a, either before

or after the amendment, as to when property passes to the trustee. It provided and still provides that upon the trustee's appointment and qualification, he is vested with the bankrupt's title as of the date of adjudication of bankruptcy. The bankrupt's title to exempt property never passed to the trustee. Before the amendment this exception was stated:

"except in so far as it is to property which is exempt."

After the amendment it read:

"except insofar as it is to property which is held to be exempt,"

The Circuit Court's decision created no field for speculation. As quoted above, it recognized that both before and after the amendment—

"the necessary factual basis precedent to the exercise of the right of selection must exist as of the date of bankruptcy; but there is no good reason for believing that under the present law the opportunity to identify or select exempt property is irretrievably cut off as of that date."

(Italics added.)

It is thus clearly apparent that while the date of bankruptcy is a line of demarkation, it is a date at which the *factual basis* precedent to the exercise of the right of selection must exist. Petitioner contends directly, and by reference (page 12) to the dissent below, that the Circuit Court's decision created or would permit the creation of a homestead and homestead right after the date of bankruptcy. It appears from the above quotation and elsewhere in the opinion that the Circuit

Court did not so hold. As pointed out in the italicized portion, it is even clearer now than before the amendment that the *right to identify or select* the exempt property is not cut off by the bankruptcy.

What the Courts below in this case held was that the factual basis did exist and the wife did have the right of selection at the time of the bankruptcy.

Petitioner refers with approval (page 12) to the dissent below. With due and sincere respect to its learned author, we suggest that a straw man is being destroyed in the dissent's discussion of the majority's holding on this point. We do not understand that we are called upon to discuss the dissent in detail because of petitioner's mere reference to it. We feel that the following may, however, save time in the comparison of the two opinions.

The Circuit Court did not (as the dissent suggested that it did—R. 81, 83) hold that the homestead and the exemption right may be created after the bankruptcy.

The Circuit Court did not (as the dissent suggested it did—R. 82) hold that Congress intended to "ameliorate" the position of the wife, a third person. The Circuit Court made no reference to the wife in considering the amendment. It did refer to the wife's position in considering the Nevada law. The differentiation of *White v. Stump* is based on the differences of the Idaho law considered in that case from the Nevada law involved in the instant case.

The dissent states (R. 83) that under the majority

opinion the claimant could wait at his will to create his exemption, perhaps for years. The Circuit Court did not hold or imply that the exemption could be "created" after the date of bankruptcy. It held that the exempt property could be identified or selected after such date. As to delay, the Circuit Court did not hold that the time to so identify or select was unlimited. In fact, the Bankruptcy Act itself sets the time within which the exemptions shall be claimed (Section 7a (8), 11 U. S. C. A. 25). Such time does not, and would not, extend beyond a reasonable period for amendment of schedules. This has been and is the law.

The procedure provided by statute is for the trustee to promptly set aside the exemptions allowed by law, if claimed, and report thereon to the courts (Bankruptcy Act 47a (6), 11 U. S. C. A. 75). The question of procedure is not involved herein. The Circuit Court in this connection was merely pointing out the significance of the amendment with reference to the right of designation and as to when such designation may be made. It was not considering the existence of an exemption with relation to the time of such adjudication. In other words, the dissent is suggesting an interpretation of the amendment which may or may not be correct, but which is not necessarily opposed to the Circuit Court's interpretation.

Lastly, the dissent states (R. 83) that the Circuit Court decided that the holding of *White v. Stump* prevents the selection of barber's tools, etc., permitted by state exemption statutes. The Circuit Court did not so

decide, but held (R. 74) that if the right of designation were cut off by bankruptcy as contended by petitioner the state exemption law would be nullified. The Court then pointed out (R. 75) that such exemption statute in Nevada included the homestead (Section 8844 (15) Nevada Compiled Laws, 1929).

We have ventured the above remarks as to the dissent as we believe them relevant to petitioner's claim and the dissent's statement that the Court's decision conflicts with *White v. Stump*. (See petitioner's Reasons Relied on for the Issuance of the Writ, page 4.)

Because petitioner has cited and relies on *White v. Stump*, arising in Idaho, and *Georgouses v. Gillen* (supra), arising in Arizona, rather than because of any belief on our part that those cases are relevant to the issuance of certiorari on the basis of conflict between federal courts, we note the following, which is, however, clearly relevant to petitioner's point II. discussed below.

Both the Idaho and Arizona statutes provide that the homestead does not exist nor is it created until the filing of a formal declaration. (See above cases for statement of state law; also 5465 and 5469 Idaho Comp. Stat.; 3292 Rev. Stat. of Arizona.) Neither state has a provision such as 8844 (15) Nevada Compiled Laws, 1929, which is a self-executing exemption statute including the homestead among its *present* exemptions. Idaho and Arizona lack statutory and judicial declaration of the protected status of the wife such as has been given in Nevada. (See above references and compare with

3360, 8844 (15), 9882.112 and 9882.113, Nevada Compiled Laws 1929, *Hawthorne v. Smith*, 3 Nev. 182, *First Nat. Bank v. Meyers*, 39 Nev. 235 at 247, 150 Pac. 308 at 312, and see analyses of District Court, R. 46, and Circuit Court, R. 69, 72.) The *Georgouses* case did not involve a wife's rights, and, according to the opinion therein, the property "admittedly" had no homestead status at the time of bankruptcy. The factual basis did not exist as here.

II. Answer to Petitioner's Second Point.

Petitioner's point II (page 12) deals with the Nevada law. We have hereinabove (page 5) suggested wherein we believe petitioner's statement as to what the Circuit Court held is in error. We emphasize that correction without here repeating it. We also refer to the above citations contrasting the Idaho and Arizona statutes with those of Nevada.

Section 8844 (15) Nevada Compiled Laws, 1929, (set forth in the Appendix) provides:

"The following property is *exempt from execution*,
— 15. And the homestead as provided for by
law." (Italics added.)

Petitioner's contention is that the words "as provided for by law" mean a homestead upon which a formal declaration has been filed in accordance with Section 3315 Nevada Compiled Laws, 1929, so that if such declaration was not filed before bankruptcy, the homestead and its exemption did not exist.

The Nevada decisions and statutes show that these words do not have such significance. On rehearing of

First Nat. Bank v. Meyers, 40 Nev. 284, 161 Pac. 929, at page 930, the Court was considering the contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed. The Court stated:

"Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can be effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the Court:

"the Constitution says: 'Laws shall be enacted providing for the recording of such a homestead.' What homestead? The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land, together with a dwelling house thereon.'

(The homestead is so defined today in section 3315, which is the law of 1865 referred to. The section is set out in the Appendix.)

Following the above statement of the respondent's contention, the Nevada Supreme Court makes extensive citation of cases to show that it has been repeatedly held in cases involving the matter of forced sale under execution that the words such as "to be selected" have no significance where there is actual occupancy and the value and quantity is as prescribed (in other words, where the factual basis exists). The Nevada court quotes the following with approval:

"The obvious purpose for which the selection is required is only to identify and define the property to which the exemption applies, so as to *distinguish* that which is *exempt* from that which may be sold at the instance of creditors." (Italics added.)

In addition to the Court's declaration in the Meyers case that a homestead "as provided by law" means the land and house and not a homestead which has been recorded, we call attention to Section 3360 Nevada Compiled Laws, 1929, referring to the wife's rights in the—

"homestead as now defined by law regardless of whether a declaration thereof has been filed or not."

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Section 9882.112 Nevada Compiled Laws, 1929, (1941 Stats. 186) provides that the Court or judge shall set apart—

"the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

The following section (9882.113) gives a similar recognition:

"If the whole property exempt by law be set apart, and should not be sufficient *** the district court or judge shall make such reasonable allowance ***"

In speaking of *First Nat. Bank v. Meyers* (supra) the Circuit Court comments:

"Thus, in the situation and for the purposes contemplated by this statute, a *de facto* homestead right subsists in the wife independently of the filing of a declaration. We think it inescapable that if regard be had for the state law the wife, at least, is not to be surprised into the loss of the right, whether by the husband's voluntary transfer or by his or his creditor's petition in bankruptcy."

It may be stated therefore, that if, as in the instant case, the factual basis exists in Nevada before the bankruptcy, the homestead and the homestead right exist at that time. Neither the homestead nor the homestead right are created in Nevada by the filing of a formal declaration any more than they are created by a claim of exemption in bankruptcy proceedings. The Circuit Court herein held that where the factual basis exists there is no reason why the bankruptcy proceedings cut off the wife's right to identify the exempt property.

The Meyers case (supra) is of further interest in that it announces the state's policy as to protecting the wife's interest in the homestead. The Nevada Supreme Court stated:

"It is manifest that the policy sought to be established by the legislature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics added.)

The policy of the Nevada law as to creditors is stated in *Hawthorne v. Smith*, 3 Nev. 182:

"If, then, it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, certainly we should not hold that a creditor can defeat that policy by any act of his, unless the statute clearly gives that right."

As we have seen, Section 8844 (15) makes the homestead (that is, the house and land irrespective of any recording) presently exempt by virtue of the statutory declaration.

Nevada cases dealing with Section 8844 (all of which were decided before 1911 when subsection 15 was added) recognize that the property listed in that section was made presently exempt by the section, even though it had not been formally claimed or designated. See *Elder v. Williams*, 16 Nev. 423, *Elder v. Frevert*, 18 Nev. 446, and *Edgecomb v. His Creditors*, 19 Nev. 149. For example, in the last case, the Court held that a livery stable keeper was not one included in the terms of the statute, and stated:

"If respondent had been engaged in a business that entitled him to claim the exemption, the property would be exempt, ***." (Italics added.)

Section 8844 was apparently passed pursuant to article I section 14, of the Nevada Constitution (set forth in Appendix). A statute similar to section 8844 and passed pursuant to a similar constitutional provision has been held to be self-executing and to exempt the homestead. *Hughes v. Newton*, 89 Fed. 213. The wife's claim of exemption was therein upheld as against the husband's creditors.

The Circuit Court's decision is not in conflict with the

two Nevada cases cited by petitioner. They were impliedly differentiated by the Court in its recognition and discussion of the fact that the homestead and the homestead right exist in Nevada (when, as here, there is the necessary, factual basis) even though a designation might be necessary to prevent the exemption being lost by sale.

In addition to this, however, in *neither* of the cases (*Lachman v. Walker*, 15 Nev. 422, and *McGill v. Lewis*, 116 Pac. (2nd) 581) was section 8844 (15) before the Court nor did the Court consider it. The *Lachman* case was decided in 1880 and long before its enactment. Whatever inference may be drawn from the language of the Court as to the law at that time, it is clear that the homestead and the homestead right now exist independent of recording. This is true whether or not the actual holding of the case is still law. There is, as the Circuit Court shows, nothing inconsistent between the rule that an exemption exists and the rule that the exempt property must be designated or the right will be waived. It certainly cannot be said that the case involves the "identical question" as in this case. The Circuit Court stated the ruling of the *Lachman* case:

"Likewise, after a sale on execution, where no declaration has been filed, the property is not exempt. *Lachman v. Walker*, 15 Nev. 422."

A further important distinction is that in the *Lachman* case the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to

vitiate the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors*. There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone.

The rights of a wife were not involved in the Lachman case. There has been no Nevada case reported where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed.

The *McGill* case is no exception. That case decided that the form and contents of the formal declaration did not comply with Section 3315 as it failed to state that the claimant was residing on the premises. There was no bill of exceptions before the court, but only the judgment roll which shewed that claimants were *not* residing on the premises at the time of sale, but were residing in another county. There was, therefore, nothing on which to base an exemption. The Court expressly stated that, because of the state of the record before it, it could not consider or decide what the legal effect of further showing of fact might be. In other words, the *factual basis* for a homestead was affirmatively shown to be lacking. We have already commented that Section 8844 (15) was not before the Court. Also the same and fundamental differentiation pointed out above as to the Lachman case is equally applicable to the *McGill* case. The *McGill* case did not hold that the

property was not exempt prior to formal recordation. Apart from any other factor, the clear distinction between the existence of an exemption and the necessity of designating exempt property before sale would distinguish the McGill case from the Circuit Court's decision.

Petitioner's contention as to the trustee's position under Section 70a (5) of the Bankruptcy Act as applied to Nevada law is so completely and succinctly answered by the Circuit Court that we feel it is only necessary to refer to the opinion. (See R. 73, 74, and 71 (130 Fed. (2d) at page 777, headnote 2, and at page 777, headnote 6.)

It is to be noted that under the laws of Nevada a debtor or his wife must be given at least twenty days notice before an execution sale takes place, in which time action may be taken to protect the homestead. (Section 8846 Nevada Compiled Laws, 1929). If petitioner's contention were correct no notice or time whatsoever would be afforded the wife in any bankruptcy proceedings by or against her husband. It is undisputed that the state law controls as to exemptions.

Furthermore, under the Nevada law, at no time could the husband alone, directly or indirectly, have effectively transferred the property without the wife's signature and consent so as to defeat her homestead (3360 Nevada Compiled Laws, 1929; *First Nat. Bank v. Meyers*, supra.)

Petitioner in effect contends that, notwithstanding the

Nevada law, the law could be circumvented and her right could be defeated by the husband's voluntary or involuntary bankruptcy.

III. Answer to Petitioner's Third Point

The contentions made under petitioner's point III at page 18 have been answered by the discussion of the above points. Petitioner states his third point as follows:

"The writ should be granted since the case of Clark v. Nirenbaum, 8 Fed. (2d) 451, does not sustain the majority opinion of the United States Circuit Court of Appeals for the Ninth Circuit."

The Clark case is cited twice by the Circuit Court (R. 71, 75; 130 Fed. (2d) 778, 779). We have already pointed out that in Nevada, as in Georgia, the homestead and the homestead right exist independent of formal declaration. The Clark case holds, under the doctrine of White v. Stump, that the designation or selection of such property may be made after bankruptcy.

The facts set forth in the Statement of Case on pages 51-56, Trans. are not controverted but it should be noted that the Statement of Facts also shows that during the period when the bankruptcy petition was filed reconciliations were being attempted and it appears with reference to the decree (Trans. 54, 55) that the bankrupt was guilty of extreme cruelty toward Mrs. Matley and the community property was awarded to her.

"which shall include, among other things, the

homestead of the parties hereto occupied by plaintiff and defendant for many years as a home and claimed as a homestead, said premises being known as No. 31 Caliente Street, Reno, Nevada" . . .

This property, claimed for many years as a homestead was exempted as such by the district court and sustained by the Circuit Court. Petitioner seeks to set aside the exemption.

It was stipulated by appellee, respondent here, (Trans. p. 56) that (appellant's) petitioner's statement of facts might be included in the record on appeal. It is to be noted that at the time this stipulation was made, the Statement of Points relied upon by appellant on appeal (Trans. 57) was stated that point (1) (appellant's brief, page 8) was "the sole question involved in this appeal". The second point or question included was not added to the record until after the case had been filed in the Circuit Court. It is not referred to in the opinion of the referee nor in the opinion of the district court. It was not argued before the district court. This second point also appears as the second specification of error (appellant's brief p. 9).

ARGUMENT IN DETAIL

The conceded facts are that, prior to and at the time of the filing of the petition in bankruptcy against the husband, Mrs. Matley was actually residing in her home and claiming it as a homestead (Trans. 53, 54, 55). The formal declaration of homestead was filed subsequent to the bankruptcy petition. As is necessarily conceded by (appellant) petitioner, the question is whether under the Nevada law the homestead was entitled to exemp-

tion as of the time the bankruptcy petition was filed against her husband.

Before discussing the Nevada law, it should be emphasized that the portion of Section 70A of the Bankruptcy Act relied upon by petitioner does no more than to vest the trustee with title of the bankrupt (Marshall Reno Matley, formerly doing business under the name and style of Matley's Food Store) to all property not exempt which "might have been levied upon and sold under judicial process against him."

As pointed out in the referee's decision, this is the only basis and the only subdivision of Section 70A under which the appellant has any possible claim. The section merely lists *what property*, other than property held to be exempt, the trustee acquires title to. It does not attempt to state the *kind of title* the trustee acquires. The trustee's position under 70A is not that of a purchaser after an accomplished judicial sale, the property having been levied on and sold. The trustee has only the rights of the bankrupt and his creditors under the Nevada law to property which is not exempt. It is respondent's contention that the property could not have been rightfully levied on and sold under judicial process against the bankrupt. Could the bankrupt or the bankrupt and his creditors have divested Mrs. Matley of her homestead rights without any opportunity by her to protect them?

The essential question is as to the status of the property at the time of the filing of the petition. Under the Nevada law, differing from the examples in other

jurisdictions cited by (appellant) petitioner, the homestead may and in this case did exist before the filing of the formal declaration. The homestead in Nevada does not require such filing to create the homestead. The homestead itself and exemption rights in it existed *at the time* of the filing of the bankruptcy petition. Except by Mrs. Matley's abandonment of her rights the bankrupt or his creditors could not have deprived her of the exemption. The (appellant) petitioner contends that the right was cut off by a filing under the federal law and in the same breath concedes that the right to exemption must be measured by the Nevada law.

Appellant refuses to recognize the distinction contended for by respondent and recognized by the district court and the Circuit Court. The exemption presently existed in Nevada and must be recognized even before any formal filing or recordation. The formal filing is no more than a notice of an existing fact. As we shall show at greater length hereafter, *White v. Stump*, 69 L. Ed. 301, relied on by appellant, dealt with Idaho law where the homestead and the exemption did not arise until such formal filing was made. The court held that it was too late to create the right after the petition was filed. We do not oppose the ruling of the White case, but, as recognized by the district court and the Ninth Circuit Court of Appeals, it is no authority to deny the exemption in the instant case.

In Nevada a homestead exists prior to a formal declaration. It has been the consistent policy of this

State throughout its history that a filing of such declaration at any time up to the very moment of sale will prevent a sale on execution. *Hawthorne v. Smith*, 3 Nev. 182, so held declaring that the law makes no reservation in favor of liens acquired before the declaration. That case also held (page 188) that the existence of debts or *actual insolvency* does not affect the right to claim the exemption. The policy of Nevada law as to creditors is stated in the Hawthorne case:

"If, then it is the policy of the law to exempt the homestead of insolvent debtors from forced sale, *certainly we should not hold that a creditor can defeat that policy by any act of his*, unless the statute clearly gives that right." (Italics ours.)

In the instant case the husband and his creditors through the trustee seek to claim greater rights than are allowed to creditors under the Nevada law.

The declared policy of the Nevada law is to protect the wife's interest in the homestead against wilful or improvident acts of the husband. The Nevada Supreme Court stated in *First Nat. Bank v. Meyers*, 150 Pa. 308, 312:

"It is manifest that the policy sought to be established by the legislature was one that would preclude the *possibility* of a wife being divested of the home by acts of her husband, perpetrated either with a design to defraud her, or through misguided or imprudent transactions in which she had no part." (Italics ours.)

In *Morrill v. Skinner*, 77 N. W. 375, Neb., the court stated:

"Whether the title to a homestead be in husband

or in wife, the act of one alone cannot divest it. The other has a vested interest therein which cannot be defeated by creditors, by the conveyance of the one holding the legal title, and, a priori, by the acts of that one short of conveyance."

Freeman on Executions states:

"Husbands there have been and may again be who are inattentive to their wives and children or willfully inflict upon them misery and want. The family of such a man, more than of any other, is within the spirit and necessity of exemption laws, and it is a strange and perverse interpretation of those laws which denies their benefit, even temporarily, to a family whose head is for the moment absent from them, or who, though not absent, is indifferent to their fate."

See also *Smith v. Thompson*, 213 Fed. 335, where the court in considering a bankruptcy case states:

"In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice."

See also *In Re Isèle*, 33 F. S. 853, 855.

As shown by the Meyers case, the bankrupt in the instant case (whose position was openly antagonistic to his wife) did not have a title which he could pass to the trustee. Such interest as he had was at all times subject to his wife's exemption right in the homestead. If (appellant's) petitioner's position were correct as to the policy of Nevada law, any husband could cut off his wife's right by, as here, failing to file a declaration and going into bankruptcy.

It is stated in *Breneman v. Corrigan*, 4 F. (2) 225 (C. C. A.) from Ore.:

"At its present term the Supreme Court of the United States distinctly adjudged that no provision of the bankruptcy law (Comp. St. 9585-9656) interferes with a state statute regarding homesteads. *White v. Stump*, 45 S. Ct. 103, 69 L. Ed. —. The very purpose of the homestead laws is to secure a home and protection for husband, wife, and children against adverse fortune and should always be liberally construed."

In *Tarner v. Bovee*, 92 F. (2) 891, (C. C. A.), the question arose whether a life policy containing endowment provisions was exempt in bankruptcy proceedings. The court held that the state laws are the measure of right to exemptions and that under the Washington statute (similar to our section 8844, (14) N. C. L.) life insurance was declared exempt, and that therefore it must be allowed whether it had endowment provisions or not. The court stated:

"Restrictions not contained in the statute should not be read into judicial construction. *Holden vs. Stratton*, *supra*. On the contrary, this being an exemption statute, we should construe it liberally. *Hills v. Joseph* (C. C. A. 9) 229 F. 865, 869; *In re Hindman* (C. C. A. 9) 104, F. 331, 333."

While the cases, *First Nat. Bank v. Meyers*, 39 Nev. 234, 150 Pac. 308, 40 Nev. 284, 161 Pac. 929, and *Porch v. Patterson*, 39 Nev. 251, 156 Pac. 439, deal primarily with the right of a husband to alienate or encumber the homestead without his wife's consent and hold no such right exists, they are important in that they affirm the Nevada rule that no act of the husband or his

creditors can defeat the homestead rights of the wife. In the Meyers case the husband arranged with a creditor to, and did, execute a deed as security for a loan. Though no formal declaration had been filed, the court held that no rights were acquired by the transfer. As far as homesteads are concerned the bankruptcy law makes no differentiation between voluntary and involuntary cases. If appellant be correct, one easy way for the husband to evade the policy of the Nevada statutes and decisions would be by a voluntary petition. By a voluntary petition he could accomplish the exact thing held in the Meyers case to be contrary to the laws and policy of Nevada.

The policy of the homestead law in Nevada has been broadened and liberalized even since Hawthorne v. Smith. A homestead de facto has been consistently recognized by the cases. Such homestead is deemed to exist independent of recordation. For example, in the Meyers opinion in 161 Pac. at page 930, the court was considering respondents' contention that the phrase "as provided by law" meant a homestead where a recorded declaration had been filed:

"Respondent contends that the homestead, 'as provided by law' mentioned in the Constitution, means the homestead as recorded, and that no homestead can become effective for any purpose unless the parties claiming the same shall have first recorded their declaration."

This contention was rejected by the majority of the court:

"The Constitution says: 'Laws shall be enacted

providing for the recording of such homestead.' What homestead? The homestead 'as provided by law.' The homestead contemplated was instituted by the law of 1865, and the homestead 'provided by (that) law' was a homestead 'consisting of a quantity of land, together with the dwelling house thereon'."

With reference to the defacto homestead the Nevada Supreme Court, at page 311 of 150 Pacific, refers to Child vs. Singleton, an early Nevada case, wherein the court had stated that the homestead of the appellants not having been selected by a recorded declaration of the claim was, at the date of the mortgage of the husband, subject to alienation by him alone. (The Child case was decided at the same session of court and shortly after Lachman v. Walker, relied on by appellant herein.)

The court in the Meyers case then states that the Act of 1897 (3360 N. C. L.) attempts to protect the *homestead de facto* and states that the very absence of a statute similar to that enacted in 1897 was what impelled the court to hold as it did in the case of Child vs. Singleton. We find a similar explanation in the Meyers opinion at page 931 of 161 Pac. The court therein states:

"Respondent argues with great earnestness that the decision of this court in the case of Child vs. Singleton, 15 Nev. 461, is decisive of the question at bar. But we are constrained to believe from the language of that decision that had the learned and eminent jurist who drafted the opinion been confronted with the statute such as that found in the amendatory act of 1897, a different conclusion would have been arrived at."

The effect of the Meyers decision is further reaching than appellant would have the court believe. As stated in the Meyers case at page 311 of 150 Pac.:

"By the Territorial Statute of 1861, as construed and applied by this court in the case of Goldman v. Clark, 1 Nevada 607, residence alone was sufficient to constitute a legal homestead."

Further along on the same page, the court states:

"The Statute of 1897 was, in effect, a re-enactment of the policy of the territorial act repealed by the Statute of 1865."

The importance of the court's holding in these cases is emphasized by the dissenting opinion of Justice Coleman in *Porch vs. Patterson*.

At page 142 of 156 Pac., Justice Coleman states:

"In considering this phase of the case, it might be well to have in mind the fact that if the amendment of 1897, *supra*, is valid, it works a practical return to the situation which existed before the adoption of the Constitution (when no recording was required.)"

Justice Coleman argued that the Meyers case "practically reverses the former decisions of the court, without discussing them at all." Justice Coleman argued that, under the decisions prior to the act of 1897, the homestead exemption did not arise except upon the recording of the declaration and that the decision in the Meyers case changed this. The majority of the court, including Chief Justice Norcross, now Judge of the District Court in the instant case, held that the homestead existed without recording and that the policy of the law was to protect the wife's interest.

That the enactment of 1897 affected the homestead law and gave the wife rights in the homestead independent of recordation seems obvious on the face of the act. This is certainly clear in reading the Meyers and Porch cases. Justice Coleman emphasized that the majority decision changed the law with reference to the significance of recording, pointing out that the Meyers decision and the act of 1897 "*works a practical return to the situation which existed before the adoption of the Constitution (when no recording was required)*." Again, on page 443, Justice Coleman refers to the law as established by the Meyers case, that "the statute of 1897 was in effect a reenactment of the policy of the territorial act repealed by the statute of 1865."

In addition to the court's clear declaration in the Meyers case that a homestead "as provided by law" means the land and house and *not* a homestead which has been recorded, we call attention to 3360 Nevada Compiled Laws, referring to the wife's rights in the

"homestead as now defined by law regardless of whether a declaration thereof has been filed or not."

Clear recognition is given to the fact that in Nevada the homestead as defined by law exists independent of recordation.

The Nevada legislature has elsewhere recognized that the homestead as provided by law does not refer just to a homestead upon which a declaration has been filed. Statutes of 1941, page 186, Sec. 112, provide that the

court or judge shall set apart

"the homestead, as designated by the general homestead law then in force, whether such homestead has theretofore been selected as required by law, or not."

From the foregoing it is clearly to be seen that the homestead and the wife's interest therein exist independently of and in the absence of any recording. It is likewise clear that a homestead "as provided by law" means a quantity of land with a dwelling house, and not, as contended by the appellant herein, a homestead upon which a formal declaration has been recorded.

This leads us to the effect of Section 8844 Nevada Compiled Laws, providing:

"The following property is *exempt* from execution, . . . 15: and the homestead as provided for by law." (Italics ours.)

The addition of No. 15 is a recent change in the law, enacted in 1911 and after the decision in Lachman v. Walker. Its application was not necessary to be considered in the Meyers case and was not raised or discussed therein. It was not considered in McGill v. Lewis. The legislature apparently passed Section 8844 pursuant to Article 1, Section 14, of the Nevada Constitution (set out in appellant's brief, page 21). A statute similar to Section 8844 and passed pursuant to a constitutional provision such as Article 1, Section 14, has been held to be self-executing and to exempt the homestead. *Hughes v. Newton*, 89 Fed. 213. The important point is that Section 8844 provides that the

homestead consisting of land and house is *exempt*. It does not provide that no exemption exists until there is a recording, but that the house and land comprising the homestead are *now* exempt. The words are of present exemption. By using the phrase "as provided for by law" the legislature must be deemed to have meant a homestead consisting of a certain quantity of land and the dwelling house thereon. It is unnecessary to cite authority that this comparatively recent enactment was made by the legislature which is deemed to have in mind the former enactments on the subject and the decisions construing them. It should also be noted that, if appellant's construction were followed, not only would there be a disregard of the other statutes and the decisions, but the legislature would be credited with a vain and idle act. The unrecorded homestead is declared by the exemption statute (8844 N. C. L.) to be exempt. There is no qualification except that it be of a particular quantity of land and the dwelling house thereon.

It is also true that any other construction would do drastic harm to the purpose and reason for its enactment. Section 3360 N. C. L. declares void any mortgage or alienation of the homestead whether or not it is recorded unless both spouses join. The obvious policy of the statute, set forth in the Meyers case, was extended in Section 8844 (15) N. C. L. There would otherwise have been no purpose in the enactment of the later statute. The very thing Section 8844 (15) seeks to prevent would occur if the homestead and the

wife's interest in it could be lost, as appellant claims it should be, by the act of the husband or his creditors.

The cases concerning homestead speak of the necessity of protecting the wife against an intent of the husband to defraud her, or against claims which might arise in the hands of his creditors by reason of his acts against her interest. This is just such a case. If the appellant's view be adopted it is particularly unfair to the wife. Under any proceedings which might take place in the state courts, the wife, if confronted with an action of the husband or a claim of his creditors, could file a declaration and defeat an execution sale. This would be the case even if the appellant's view of the state law were correct. With bankruptcy proceedings, however, to which the wife was not a party, the mere filing of the petition cuts off the wife's rights if no formal declaration had been theretofore filed, according to the appellant's contention. It is a matter for very serious consideration, therefore, to determine if the Nevada law is such that the wife has no exemption right unless a declaration has been theretofore filed. It is our contention that the statutes and decisions of this state do not leave the wife thus defenseless. We say, and we have pointed out that the Nevada law differs in important particulars which remove our state from the unfortunate situation existent in the jurisdictions from which came the White and Georgouses cases relied upon by the appellant.

With reference to the policy of our laws, will the husband or his creditors be permitted to do indirectly

that which it is admitted they cannot do directly? The bankruptcy law and the decisions on homesteads do not differentiate between voluntary and involuntary bankruptcy. Under the appellant's view there is nothing to prevent the husband of depriving the wife of the homestead without her consent by filing such petition. Yet it is undeniable that it is the declared policy of Nevada to prevent such deprivation.

We hereinabove referred to *Hughes v. Newton*, 89 Fed. 213, wherein it appears that under a Constitutional provision nearly identical in wording to Nevada constitution, Article I, Section 14, the Wisconsin legislature passed an act very similar to Section 8844 (15) N. C. L. The court holds that the homestead was exempt from seizure and sale and upheld the wife's claim of exemption as against the husband's creditors. The statute was, like 8844 (15), self-executing and created a present exemption. The case of *Turner v. Bovee*, supra, will be recalled in this connection.

An examination of the Nevada cases dealing with Section 8844 indicate clearly that, as stated by the section itself, the property is made exempt by the statute without further action by the debtor. Subdivision 15, being a recent enactment, has not been dealt with specifically in any Nevada case.

In *Elder vs. Williams*, 16 Nev. 423, the court was considering Section 8844 (then 1282 Comp. L.). At that time the homestead was not included in the list of exempt property. The decision in the Elder case was that the fraudulent concealment of non-exempt

property equal in value to the property claimed as exempt does not deprive the debtor of an otherwise valid claim of exemption. The court was considering whether the team and horses mentioned in the statute was properly exempt in that case. The trial court instructed the jury as to a teamster that when he pointed out the animals the law would recognize and protect them as his exempt property.

On page 422, the court stated:

"As to the property mentioned in the statute as exempt, only one exception is stated, and that is that no article or species of property mentioned in the section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon. The constitution provides that, 'the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome law, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted'."

(Const. Art. I, Section. 14.)

"The statute was undoubtedly passed in compliance with the constitutional requirement. Since the Statute declares that the plaintiff is entitled to hold the property in suit as exempt from execution, except in the one case stated, what right have courts to engrave upon the statute another exception? It is provided that one sewing machine not exceeding in value one hundred and fifty dollars, in actual use by the debtor, or his family, shall be exempt. All other sewing machines may be sold. He is allowed to retain one that is in actual use, because it is the policy of the constitution and law, and the interest of the state, that no citizen shall be stripped of the implements necessary to enable him to enjoy the necessary comforts of life and to carry on his usual employment; and that, if he has

one, his family shall not be made paupers or beggars in consequence of the follies, the vices, or the crimes of their head."

The court then refers to various exemptions given, as tools of mechanics, etc., "are all declared absolutely exempt, except upon a judgment for their price."

In speaking of protection for debtors and of debtors with families,

"The latter class is certainly included, and as to them, it is as reasonable to presume, under the statute as it is written, that one of the objects of exemption was to protect their families as it would have been, if persons without families had not been included among the beneficiaries."

An outgrowth of the above case was *Elder vs. Frevert*, 18 Nev. 446, which was suit against defendant sheriff for recovery of the wagon and horses exempt from execution together with damages for their detention. The court stated:

"The statute *exempts* two horses and their wagon for the purpose of enabling the debtor to earn a living." (Italics ours.)

In *Edgecomb v. His Creditors*, 19 Nev. 149, the court held that a livery stable keeper is not one included in the terms of the statute:

"If respondent had been engaged in a business that entitled him to claim the exemption, the property would be exempt, . . ." (Italics ours.)

There is no similar provision in the Idaho law considered in *White v. Stump* or the Arizona law considered in *Georgouses v. Gillen* or in the Washington law dealt with in *Coopman v. Bank*, cases cited by the

(appellant) petitioner. We do not understand that the case of *Clark v. Nirenbaum*, 8 F. (2) 451 (C. C. A.), is, as stated by (appellant) petitioner, in conflict with the White case. The Circuit Court, in deciding the Clark case, specifically considered the White case and basing its decision on that case determined that the homestead exemption should be allowed. The Nevada statute declares the homesteads *are* exempt. There was a present right of exemption under the Nevada law at the time of the filing of the bankruptcy petition. This fact in and of itself takes this case completely out of the holding of the White, Coopman and Georgouses cases, which were dealing with state statutes and decision different from those of Nevada. Each of these cases state the established rule that the question of the right to exemptions depends on State law. The policy, statutes and decisions of Nevada are such that the deprivation of (respondent's) Mrs. Matley's homestead exemption would be contrary to both Nevada law and the Federal bankruptcy statute.

The distinction which is recognized by Judge Norcross, the District Court Judge herein and former Chief Justice of the Nevada Supreme Court, is that under Nevada law the homestead exists and is exempt even before the filing of a declaration. As indicated in the Nevada cases just cited the exemption exists by virtue of the statute. It is true that if the debtor does nothing upon levy and permits the sale to go through he may waive the exemption. That is true as to all exemptions. Under the bankruptcy law, for example, the debtor, or, as here, his wife, may and

should point out to the court and its officials the property which is exempt. It will only be set aside as exempt upon someone's action in that regard. But that selection, whether it be by previous recordation and subsequent claim in bankruptcy, or just by the claim in bankruptcy, is not the thing which makes it exempt. It is already exempt by statute. It is appellee's position that the property must be set aside as her homestead even if there had been no Section 8844 (15). In the face of that section, however, her right must be recognized.

It is this same distinction which is recognized in the Circuit Court decision of *Clark v. Nirenbaum*, 8 F. (2) 451, cited by the District Court in its decision herein (Trans. 50). In that case, which allowed the homestead to be set aside in the bankruptcy proceedings, though no formal application in the State had been theretofore made, the court states:

"An exemption is the freedom of debtors from liability to seizure and sale under legal process for the payment of their debts."

In that case the bankrupts, at the time of the filing and adjudication, had not made the formal application provided for by Georgia law, but claimed the homestead exemption thereafter during the bankruptcy proceedings. The court points out that under the Georgia law the constitution and statute provide for the exemption and that it exists although the exemption itself, the setting aside, is not allowed until the application for setting apart is made. In other words, to be entitled to the benefits of the exemption an assertion of the

exemption must be made, but the right of exemption was nevertheless existent at the time of the filing of the bankruptcy petition. The court held that it made no difference, "that the exemption was not ascertained or set apart until after the proceedings in bankruptcy were begun." The court goes on to say:

"It is insisted, however, that the recent case of White v. Stump, 266 U. S. 310, 45 S. Ct. 103, 69 L. Ed. 301, is authority for the opposite view. But in the case the Supreme Court was only giving effect to the homestead exemption prescribed by the laws of Idaho, as construed by the state court of last resort. In that state a homestead does not come into existence until a declaration that the land is occupied and claimed as a homestead is made and filed for record. 'Up to that time,' says the court, 'the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it.'"

The court points out that upon the filing of a levy or attachment, the debtor in Georgia may move to claim his exemptions, but it does not mean that the right of exemption was not existent. It is true that the right could not be created after the filing, but that is a different thing. The court remarks that the claim and setting aside in the bankruptcy court is essentially the same thing accomplished in the state procedure. The trial court's decision allowing the exemption was affirmed:

"The true adjustment of bankruptcy to the Georgia exemptions is to treat the filing of the petition in bankruptcy as the equivalent of a levy or attachment on all the bankrupt's property, which he may

meet before an actual sale by having the exemptions to which he is entitled, if not previously ascertained, set apart to him by the machinery of the bankruptcy court just as he would do in the state court had state process been levied upon it."

Now, the status of the homestead in Georgia and Nevada is very different from the "present" lack of a homestead right which was the situation in Arizona, Washington and Idaho prior to the filing of a declaration. In the Georgouses case, for example, relied on by appellant herein, it is stated that "when the bankruptcy was filed no part of the property had a homestead status." As we have seen, this is *not* the case in Nevada. Considering again Section 8844 Nevada Compiled Laws, the exemption statute, we have shown that the Nevada law and decisions recognize the presently exempt quality of the property listed in that section, which now includes the homestead. As in the Nirenbaum case, the statutes concerning the homestead exemption are self-executing in contemplation of the federal bankruptcy law which requires an exemption as of the time of the bankruptcy filing. The fact that such property may be thereafter set apart or pointed out does not mean that it was not exempt at the time of filing. That is the holding of the Nirenbaum case, and, in view of the difference of the laws of the various jurisdictions that case is not at variance with the White, Coopman and Georgouses cases on which (appellant) petitioner relies. It must not be forgotten that the question of whether certain property constitutes a homestead or is exempt is to be determined by the law of the particular state in which the property is situated.

In the case of *In re Friedrich*, 100 Fed. 284, C. C. A., the court was concerned with certain exemption out of partnership assets. The court held:

"We do not think that an actual severance from the common stock of the articles claimed as exempt before petition in bankruptcy is filed is essential."

The court also commented that where the property was exempt, upon being pointed out, the severance in fact of exempt property from the general estate was to be made by the trustee, not the debtor.

But as we have said; the federal courts must follow the state law as to exemptions. Hereinabove we cited *Elder v. Williams*, *Elder v. Freret*, and *Edgecomb v. His Creditors*. While those cases dealt with Section 8844, Nevada Compiled Laws, before the homestead was added to the property listed in the section, they show conclusively that the property was made presently exempt by the section, even though at any given time it had not been formally claimed as such or pointed out. The property listed in 8844 Nevada Compiled Laws is not property of the debtor which might "be levied upon and sold against him." So with the homestead in this case, it did not pass to the trustee under 70A as it was not property of the debtor at the time of filing "which might have been levied upon and sold under judicial process against him."

The Idaho law with which the White case was concerned differs fundamentally from Nevada law. As quoted by the district court herein (Trans. 46) the White case states that under Idaho law

"The exemption arises where the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it."

The difference in the Idaho law is emphasized by two Idaho cases cited in *White v. Stump*, namely *Smith v. Richards* and *Law v. Spence*. In the *Smith* case the court expressly refused to follow *Hawthorne v. Smith*, 3 Nev. 164, which held that a declaration of homestead filed after attachment stopped any sale. The *Law* case held that a mortgage lien given by the husband could not be defeated by the wife's claim that the premises were a homestead though no declaration was filed. This is contrary to the Nevada policy which is expressed in the *Meyers* case as: "though the homestead is not registered as required by law, the husband's sole conveyance or encumbrance of it cannot pass title." It is also to be noted that the Idaho statutes contain provisions which support the holding of the *White* case and which are completely foreign to Nevada law. Section 5441 Idaho Comp. Stat. 1919 provides that the premises are subject to execution or forced sale in satisfaction of judgments obtained "before the declaration of premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration."

Also, as the *White* case remarks, the Idaho statutes provide that the declaration "must" be recorded. Section 5465 Idaho Comp. Stat. provides:

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 of the Idaho statutes provide:

"From and after the time the declaration is filed for record the land described therein constitute a homestead."

It is thus clearly to be seen that the statutes, the decisions and the policy in Idaho are radically different from those in Nevada. We have no similar statutes in Nevada. The homestead in Nevada exists before any filing of a formal declaration. Appellant (petitioner) concedes that a filing at any time before a sale will defeat the sale. In Nevada the exemption exists before any filing and after any levy even though the property may have to be claimed as exempt to enforce the exemption. These things are not so in Idaho. In Idaho the *homestead itself and all exemption rights* are created by the filing of a declaration and do not exist prior thereto. Taking the filing of the bankruptcy petition as the cleavage point in time, the *Idaho* law provides that, unless the formal declaration has been filed theretofore, there is no homestead and no right of exemption. We say, therefore, that while the rule of the White case is not disputed, and in fact was recognized by the district court herein and by *Clark v. Nirenbaum*, it is no authority for denying the exemption claim of Mrs. Matley.

In addition to the comments on *Georgous v. Gillen* heretofore made, it should be noted that the Arizona law is in the general class of the Idaho law, in that the homestead itself and any right of exemption arises

only upon the filing of a formal declaration. That in Arizona such right may be created after the filing of a lien to defeat the lien was held not to take the case out of the rule of White v. Stump because the property had no "homestead status" prior to such filing. The district court herein further differentiates the Georgouses case (Trans. 46) by stating:

"In the case of Georgouses v. Gillen, *supra*, no question of a wife's rights in property subject to a homestead status was presented."

Also Arizona does not have an exemption statute such as 8844 (15) Nevada Compiled Laws.

Apart from the necessary effect of 8844 (15) N. C. L. it should not be overlooked that the general policy of Nevada law has been steadily extended for the protection of the wife. In Lachman v. Walker decided in 1880 and cited by appellant at pages 25 and 28 the levy was made *after* the property had been conveyed to plaintiffs, and plaintiffs attempted to stop the sale by relying on a homestead which they claimed had been established by plaintiff's *predecessors*. There was no pretense that plaintiffs, the ones owning the property at the time of the levy, claimed the property as their own homestead. It was not a homestead in fact at that time and there had been no formal declaration filed by anyone. We have heretofore remarked on the fate of the Child case decided at the time of the Lachman case. Also, of course, 8844 (15) N. C. L. had not been passed at the time of the Lachman case.

There has been no Nevada case (with the possible

exception of one reversed in the Meyers case) where the rights of the wife who was actually residing on the premises have not been protected and the exemption allowed. Even in the McGill case the court was dealing solely with a judgment roll which showed a faulty declaration and the fact that the claimants resided in another county from where the premises were situated.

The position of a trustee in bankruptcy is clear. He takes no title to exempt property and exemptions are to be judged solely by the state law. He stands in the bankrupt's shoes with the bankrupt's rights and certain creditor's rights. It is admitted that no act of the husband could deprive the wife of her rights in the homestead and it is the expressed policy of the law that no act of the husband's creditors shall deprive the wife of such rights. It is interesting to note in this connection that if sufficient moneys were realized from the sale of other assets belonging to the bankrupt aside from the homestead property, the bankruptcy proceedings would be ended and dismissed and there would be no question but that the homestead property would remain intact. As expressed in *In re Chrl.*, 38 F. Supp. 414 and at 418 it was the policy of the bankruptcy laws to recognize and give effect to the state exemption laws; that title to property exempt under such laws does not pass to the trustee; and that the bankruptcy court has jurisdiction only for the purpose of determining if the exemption is proper and "cannot require its sale even on the petition of creditors holding a waiver or otherwise entitled to compel the application of the exempt property to the satisfaction of their

claims." Many cases are cited including Clark v. Nirenbaum.

PETITIONER'S SECOND POINT, discussed at pages 34 to 37 of his brief, filed in the Circuit Court, is a point added to the appeal record after the case was filed with the Circuit Court. It was not referred to in the opinion of the referee nor in the opinion of the district court. It was not argued before the district court. While we believe this point cannot be relied upon by petitioner we will nevertheless answer it. This second point is stated at page 34 of petitioner's brief in the lower court to be: "Whether declaration of homestead under facts stipulated was sufficient under Nevada laws."

It is to be observed that, as we have above shown, a formal filed declaration is not necessary to either create a homestead or to give it an exempt status.

Appellant's (petitioner's) statement at page 3 of his brief in the Circuit Court is misleading in saying that the facts show appellee had not been deserted or left by her husband in the matrimonial domicile at Fernley. Petitioner's statement of fact does not show this. It shows that the matrimonial domicile was the Caliente Street house, not Fernley, and that they were only temporarily at Fernley for a business venture. At the time of the filing of the petition Mrs. Matley was living in her home on Caliente Street. It does not appear where the bankrupt was staying at that time. Petitioner's contention logically followed out is that if a petition in bankruptcy happens to be filed on a day when the

husband is away from home, the homestead is not exempt. Such contention answers itself and is not the law. As to the fact that Mrs. Matley was living alone in the house at the period in question it is to be noted that appellant's (petitioner's) statement shows that reconciliations were attempted at the time and believed possible. The divorce occurred about seven months after bankruptcy. Petitioner argued that the exemption is to be considered as of the time of filing of the petition. The subsequent divorce is, of course, irrelevant as to the exemption. Temporary separations between husband and wife are not infrequent, and in contemplation of law the parties are still to be considered as residing at the family home. It does not appear where the bankrupt was during this period. Suppose he had gone to Idaho and later returned, the attempted reconciliation being successful. Would it be said he was not a resident of Nevada and the Caliente Street house for such period? Obviously not, yet there is no difference so far as this case is concerned.

Apart from this, however, the facts, if they impliedly show anything as to desertion or abandonment, show that the bankrupt's treatment of his wife was such as to justify a separation and that the cause of their separation, however temporary, was his cruelty. It is elementary law that if either party is to be considered as deserting the other, it is the one whose cruel treatment forced the separation. Hence, whatever desertion there was, was by the bankrupt. It will not be forgotten that the expressed policy of Nevada law is that

the wife shall not lose the homestead by any act of the husband.

The very same day that the bankruptcy petition was filed, the bankrupt consented that he be adjudicated a bankrupt and such order was entered that day. His treatment of Mrs. Matley was such that she was forced to seek and later secured a divorce on the ground of extreme cruelty. Around the time when the petition was filed reconciliations were believed possible and were attempted (Trans. 54). It appears from the record and was also testified in detail in connection with matters not here for consideration that the bankrupt's attitude was adverse to his wife's interests. It is from a situation such as this that the Nevada law has increasingly sought to protect the wife.

The uniform law in connection with homesteads is that conduct of the husband such as took place in the instant case will not deprive the wife of the homestead.

The homestead character of the premises was unquestionably established and was never abandoned. In this case, there was an actual return to the premises by Mrs. Matley and resumption of the residence prior to the bankruptcy and continuing thereafter. As Mrs. Matley testified (Trans. 53) as to the stay at Fernley:

"They considered such occupancy temporary and rented the Reno property in the meantime with the intention of holding and returning to it and that at all times she and the bankrupt considered the Reno property to be their home."

The law is established that under such circumstances

as here, the temporary absence of the parties is not an abandonment of the homestead and does not deprive the claimant of the right to claim the exemption. This is recognized even in the cases cited by appellant. It has many times been said that actual occupancy does not mean constant personal presence so as to make one's residence his prison and that temporary absence does not constitute a removal or abandonment.

See the following authorities:

Foreman v. Meroney, 62 Tex. 723, 727;
29 C. J. 938, par. 355;

In re Pope, 93 Fed. 722;

Watson v. Hurlburt, 170 Pac. 541, Ore.;

Elliott v. Bond, 176 Pac. 242, Okl.;

Watteerson v. E. L. Bower Co., 48 Pac. 1108;
29 C. J. 939;

Long v. Talley, 201 Pac. 990;

Weatherington v. Smith, 109 N. W. 381, 112 N. W. 566, Neb.;

Morrill v. Skinner, 77 N. W. 375, Neb.;

Grace v. Grace, 104 N. W. 969, Minn.

In *Goldman v. Clark*, 1 Nev. 607, it was argued that the renting of the premises lost the homestead rights. The court states:

"And the fact that the husband rented out the premises for a period as a lodging house can make no difference to her. Nothing but her own deed, properly acknowledged, could divest her rights."

The homestead right is not lost even when the wife leaves the homestead when such absence is enforced by acts of the husband. The courts hold that her rights continue the same as if she had continued to stay on the

premises. *Batker v. Dayton*, 28 Wis. 367; *Keyes v. Scanlan*, 23 N. W. 570, Wis., *Sherrid v. Southwick*, 5 N. W. 1027, Mich.; *Vanzant v. Vanzant*, 23 Ill. 542; *Rogers v. Day*, 74 N. W. 190, Mich.; *Swingle v. Swingle*, 162 N. W. 912, N. D.; *Novotny v. Horecka*, 206 N. W. 110, Iowa. See also *Brown v. Brown*, 68 Mo. 388.

The courts have many times held that the husband may not consent to a decree which would forfeit the wife's rights to the homestead or to an alienation which would accomplish that result. See *Allen v. Hawley*, 66 Ill. 164; *Beecher v. Baldy*, 7 Mich. 487; *Dye v. Mann*, 10 Mich. 29; *McKee v. Wilcox*, 11 Mich. 358; *Snyder v. People*, 26 Mich. 106; *King v. Moore*, 10 Mich. 538; *LaLonde v. Bloom*, 188 N. W. 291; *Voss v. Rezgis*, 175 N. E. 799; *O'Neil v. Bennett*, 207 N. W. 543; *Beard v. Beard*, 10 Tenn. App. 52.

CONCLUSION

IN CONCLUSION, it is respectfully submitted that the judgment of the District Court in the instant case should stand as affirmed by the Circuit Court of Appeals for the Ninth Circuit.

DATED: February 23, 1943.

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APPENDIX

Section 6 of the Bankruptcy Act (11 U. S. C. A. 24) reads:

"This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security, only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

The relevant portion of Section 7 of the Bankruptcy Act (11 U. S. C. A. 25 (8)) reads:

"The bankrupt shall *** (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their

residence, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated; or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided*, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; ***

The relevant portion of Section 47 of the Bankruptcy Act (11 U. S. C. A. 75a. (6)) reads:

"Trustees shall *** (6) set apart the bankrupt's exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; ***"

The relevant portion of Section 70 of the Bankruptcy Act (11 U. S. C. A. 110a. (5)) now reads:

The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or the original petition proposing an arrangement or plan under this title, except insofar as it is to property

which is held to be exempt, to all *** (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized; impounded, or sequestered: ***

(Note: The italicized portion above, prior to the 1938 amendment, read: "which is exempt".)

The Nevada Constitution and statutes referred to are:

Nevada Constitution, Article 1, Section 14, reads:

"The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities hereafter contracted; and there shall be no imprisonment for debt except in cases of fraud, libel or slander, and no person shall be imprisoned for a militia fine in time of peace."

Nevada Constitution, Article 4, Section 30, reads:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists; but no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of the premises, or for the erection of improvements thereon; provided, the provisions of this section shall not apply to

any process of law obtained by virtue of a lien given by the consent of both husband and wife, and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

Section 3360, Nevada Compiled Laws, reads:

"The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate; provided, that no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has been filed or not, shall be valid for any purpose whatever unless both the husband and the wife execute and acknowledge the same as now provided by law for the conveyance of real estate; provided further, that the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family."

Section 8844, Nevada Compiled Laws, reads:

"The following property is exempt from execution, except as herein otherwise specifically provided:

"1—Chairs, tables, desks, and books to the value of two hundred dollars, belonging to the judgment debtor.

"2—Necessary household, table, and kitchen furniture belonging to the judgment debtor ***.

"3—The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also two oxen, or two horses, or two mules, ***.

"4—The tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public ***.

"5—The cabin or dwelling of a miner or prospector, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, ***.

"6—Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage for one or two horses, or one motor vehicle, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living ***.

"7—Poultry not exceeding in value seventy-five dollars.

"8—The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment ***.

"9—All fire engines, hooks and ladders ***.

"10—All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor.

“11—All courthouses, jails, public offices and buildings ***”

“12—All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building ***”

“13—All machinery, tools and implements necessary in and for boring, sinking, putting down, and constructing surface or artesian wells; ***”

“14—All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance ***”

“15—*And the homestead as provided for by law.*

“16—The dwelling of the judgment debtor occupied as a ‘home for himself and family, where said dwelling is situate upon lands not owned by him’.

“No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment to recover for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon.”

Section 3315, Compiled Laws of Nevada, reads:

“The homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale on execution, or any final process from

any court, for any debt or liability contracted or incurred after November thirteenth, in the year of our Lord one thousand eight hundred and sixty-one, except process to enforce the payment of the purchase money for such premises, or for improvements made thereon, or for legal taxes imposed thereon, or for the payment of any mortgage thereon, executed and given by both husband and wife, when that relation exists. Said selection shall be made by either the husband or wife or both of them, or other head of a family, declaring their intention in writing to claim the same as a homestead. Said declaration shall state when made by a married person or persons that they or either of them are married or, if not married, that he or she is the head of a family, and they or either of them, as the case may be, are, at the time of making such declaration, residing with their family, or with the person or persons under their care and maintenance, on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead, which declaration shall be signed by the party or parties making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded; and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants; provided, that if the property declared upon as a homestead be the separate property of either spouse, both must join in the execution and acknowledgement of the declaration; and if such property shall retain its character of separate property until the death

of one or the other of such spouses, then and in that event the homestead right shall cease in and upon said property, and the same belong to the party (or his or her heirs) to whom it belonged when filed upon as a homestead; and, provided further, that tenants in common may declare for homestead rights upon their respective estates in lands, and the improvements thereon; and hold and enjoy homestead rights and privileges therein, subject to the rights of their co-tenants, to enforce partition of such common property as in other cases of tenants in common."

The relevant portion of Section 8846, Nevada Compiled Laws, 1929, reads:

"Before the sale of property on execution, notice thereof shall be given as follows: *** 3. In case of real property, by posting a similar notice particularly describing the property, for twenty days, successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and also by publishing a copy of said notice once a week, for the same period, in a newspaper, if there be one, in the county;***"

The relevant portion of Section 5465, Idaho Comp. Stat., reads:

"From and after the time the declaration is filed for record the premises therein described constitute a homestead."

Section 5469 Idaho Comp. Stat. reads:

"From and after the time the declaration is filed for record the land described therein is a homestead."

The relevant portion of Section 3292 R. S. 1913, Arizona (1733 Rev. Code 1928) reads:

"Exempt from time of filing. The homestead shall, from the date of recording the claim, be exempt from attachment, execution and forced sale, and from sale under any judgment or lien existing prior to the recording of such claim, ****"

SUPREME COURT OF THE UNITED STATES.

No. 540.—OCTOBER TERM, 1942.

G. E. Myers, Trustee of the Estate
of Marshall Reno Matley, formerly
doing business under the name
and style of Matley's Food Stores,
Petitioner,

vs.

Verna May Matley.

On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Ninth
Circuit.

[April 5, 1943.]

Mr. Justice ROBERTS delivered the opinion of the Court.

The petitioner's assertion that the court below misapplied § 70(a) of the Bankruptcy Act, as amended,¹ in contravention of a decision of this court,² and contrary to the law of the State of Nevada, as well as a division of opinion of the judges in the court below, moved us to grant certiorari.

October 24, 1940, a petition in bankruptcy was filed against Marshall R. Matley, the respondent's husband. He appeared and consented to an adjudication which was entered the same day. November 20, 1940, the respondent filed with the Recorder of Washoe County, Nevada, her declaration claiming as a homestead a tract of land in Reno, Nevada, listed in her husband's bankruptcy schedules. November 27, 1940, she filed in the bankruptcy court a petition claiming the land as exempt. The referee denied her claim, the District Court reversed the referee, and the Circuit Court of Appeals affirmed its decision.³ The real estate in question, acquired by the respondent and her husband while married, was community property on which a residence was built and occupied by the couple as a home. While they were absent from it at times, they always considered it their home and intended to return to it. Although they were separated in 1940, the re-

¹ Act of July 1, 1898, c. 541, § 70, 30 Stat. 565; Act of June 22, 1938, c. 575, § 1, 52 Stat. 879; 11 U. S. C. § 110.

² *White v. Stump*, 266 U. S. 310.

³ 130 F. 2d 775.

spondent was residing on the land when the petition in bankruptcy was filed. A divorce action was pending but was not concluded until May 1941 when the respondent was granted a divorce and the Reno residence was awarded her as her sole property.

The petitioner asserts that the property cannot be set apart to the respondent as exempt since her homestead declaration was not filed, as required by State law, until after entry of the petition in bankruptcy.

Section 70(a) originally provided that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt "except in so far as it is to property which is exempt," The phraseology was altered by the amendment of 1938 to except "property which is held to be exempt," Section 6 of the Bankruptcy Act declares that the provisions of the Act shall not affect the allowance to bankrupts of the exemptions "which are prescribed by the State laws in force at the time of the filing of the petition" in the state where the bankrupt has had his domicile. The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists.⁴ An adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale.

The question thus arises whether the respondent's right of homestead under Nevada law, secured by her filed declaration, prevails against the right and title of the trustee. The court below so held and we think its judgment was right.

1. We conclude that the new phraseology in the amendment of § 70(a) does not alter the principles applicable to the exemption of homestead property in bankruptcy. On the face of the legislation the intent of Congress was merely to clarify the meaning of the section. We are referred to no legislative history indicating that the alteration was intended to work a change of substance. Under the amendment as under the original provision, a homestead is exempt if, under the state law, it would be held to be exempt.

⁴ 30 Stat. 548, 11 U. S. C. § 24.

⁵ § 70(e); 52 Stat. 881; 11 U. S. C. § 110(e).

White v. Stump, supra, involved a homestead exemption claimed pursuant to the law of Idaho, under which the declaration of homestead was required to be executed and acknowledged, like a conveyance of real property, and filed for record. The exemption arose when the declaration was filed and not before. Up to that time the land remained subject to execution and attachment like any other land; and where a levy was effected while the land was in that condition the subsequent making and filing of a declaration neither avoided the levy nor prevented a sale under it.⁶ It appeared that no declaration was made and filed of record until a month after Stump's petition and adjudication in bankruptcy. The declaration was then made and filed by his wife for his and her joint benefit. This court held that the Bankruptcy Act fixed the point of time which is to separate the old situation from the new in the bankrupt's affairs as the date when the petition is filed; that when the Act speaks of property which is exempt, and rights to exemption, it refers to that point of time,—namely, the point as of which the general estate passes out of the bankrupt's control and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The court said: "The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process."⁷ Accordingly it was held that, as the claim of exemption was not perfected until after the petition was filed, it was ineffective as against the trustee, as it would have been against a creditor then having a levy on the property. If the law of Nevada respecting homestead exemptions were like that of Idaho, or operated in the same way, *White v. Stump* would be in point.

3. The Nevada Constitution, Art. 4, Sec. 30, reads in part:

"A homestead, as provided by law, shall be exempt from forced sale under any process of law, and shall not be alienated, without the joint consent of husband and wife when that relation exists; and laws shall be enacted providing for the recording of such homestead within the county in which the same shall be situated."

⁶ *White v. Stump, supra*, p. 311.

⁷ *White v. Stump, supra*, p. 313.

Section 3315 of the Compiled Laws of Nevada defines property which may be claimed as exempt as a homestead and permits selection by either the husband, the wife, or both, by a declaration of intention in writing to claim the same. After providing what the declaration shall contain and that it shall be signed, acknowledged, and recorded as conveyances of real estate are required to be acknowledged and recorded, the statute continues: "from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants".

Section 8844 provides that "the following property is exempt from execution, . . . the homestead as provided for by law."

Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution amongst them of the bankrupt's assets.⁸ The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody.

Our question then is whether, under the constitution and statutes of Nevada, a declaration of homestead would be effective as against a creditor to prevent a judicial sale of the property if made and recorded after levy but before sale thereunder. If it would, it must be equally effective as against the trustee, whose rights rise no higher than those of the supposed creditor and attach at the date of the inception of bankruptcy.

Examination of the Nevada cases relied on by the court below satisfies us that the settled law of the State entitles the debtor to his homestead exemption if the selection and recording occurs at any time before actual sale under execution.⁹ And indeed the petitioner so concedes in his brief, stating that he "admits that under the laws of Nevada as interpreted by the Nevada Supreme Court, a declaration of homestead filed at any time prior to actual execution sale is sufficient to establish the homestead right."

In conformity to the principle announced in *White v. Stump* that the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may

⁸ Remington, *Bankruptcy*, 4th Ed., pp. 4-6; *In re Youngstrom*, 153 Fed. 98, 103-4, and cases cited.

⁹ *Hawthorne v. Smith*, 3 Nev. 182; *McGill v. Lewis*, 116 P. 2d 381.

do, it remains true that, under the law of Nevada, the right to make and record the necessary declaration of homestead existed in the bankrupt at the date of filing the petition as if it would have existed in case a levy had been made upon the property. The assertion of that right before actual sale in accordance with State law did not change the relative status of the claimant and the trustee subsequent to the filing of the petition. The federal courts have generally so held and have distinguished *White v. Stump* where the state law was similar, in terms or in effect, to that of Nevada.¹⁰

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

¹⁰ *In re Trammell*, 5 F. 2d 326; *Clark v. Nirenbaum*, 8 F. 2d 451; *McCrae v. Felder*, 12 F. 2d 554. *Contra: Georgousas v. Gillen*, 24 F. 2d 292.